85-641

Supreme Court, U.S.
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NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT C. HATCH and CLAUDIA R. HATCH; and TRUSTORS OF HERITAGE TRUST COMPANY,
Petitioners,

vs.

RELIANCE INSURANCE COMPANY, a corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Would denial of this petition be interpreted by lower courts and litigants as a new rule by this Court overruling its time-honored decisions holding that the plaintiff has the right to state his case?

2. Does the Appeals Court decision conflict with decisions of this Court holding that

a. every claim in a common cause of action must be shown to exceed the jurisdictional minimum of $10,000;

b. removal statutes must be construed strictly in favor of State Court jurisdiction; state court judgments must be honored;

c. petitioners could not have brought their action in a Federal court;

d. the Federal courts below lacked jurisdiction to determine class action questions in a case improvidently removed from the State Court?

3. Should this Court exercise its power of supervision over the Appeals Court below?

Designation of Parties
The caption of the case in this Court contains the names of all parties.

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REFERENCE TO REPORTS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 758 F. 2d 409 (1985),[1] as Hatch v. Reliance Insurance Co. (the caption includes as defendant the receiver for Heritage Trust Co.—not a party in this case).

An unpublished disposition is reported in Reliance v. Koeb, 665 F. 2d 1053, No. 80-5277 (9th Cir. 1981) (related interpleader case).

1. *There are special and important reasons for this Court to grant review and vacate the published decision which seriously conflicts with this Court's decisions defining Constitutional and Congressional parameters of federal jurisdiction. To deny review could be interpreted by courts and litigants as an expansion of federal jurisdictional limits.*

STATEMENT OF GROUNDS FOR SUPREME COURT JURISDICTION

i. The decision sought to be reviewed is the judgment of the Ninth Circuit Court of Appeals, dated and entered April 16, 1985 (Appendix A).

ii. The date of the Appeals Court Order denying petition for rehearing is July 17, 1985 (Appendix B).

iii. (inapplicable)

iv. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is: 28 U.S.C. § 1254(1) (Appendix Y). (The 90-day requirement of 28 U.S.C. § 2101(C) and Supreme Court Rule 20.4 is complied with.)

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES WHICH THIS CASE INVOLVES

The Constitution of the United States:

Article III.

* * *

Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority: * * * between Citizens of different states * * *

[2] * * * In all the other Cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Article IV.

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may be general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Amendment V

* * *

(No Person shall) be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .

Title 28, United States Code, § 1861. Declaration of Policy

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries . . .

Pertinent provisions of the following sections of Title 28, United States Code, are set forth verbatim in **Appendix Y: § 1254(1); 1332(a)(1) . . . (b)(c); 1441(a)(b)(c); 1446(a) . . . (e); 1652; 1758.**

Pertinent provisions of State Court Statutes & Rules are set forth in **Appendices W—Article 5529, Stat. of Limitations; Z—Rule 42–Class Actions: and Z-1—Rule 65–Substituted Instrument Takes Place of Original.**

STATEMENT OF THE CASE

Background Facts Material To An Understanding of the Case

Litigation of this cause has proceeded for ten years. Petitioners, Robert C. Hatch and his wife, Claudia R. Hatch, are retired citizens of the State of Texas. Beginning in December, 1973 they invested their savings and monthly Air Force pension payments in so-called "revocable inter vivos trusts," sold by Heritage Trust Company (Heritage), an Arizona corporation now insolvent and represented by the Superintendent of Banks for the State of Arizona as Receiver.

Heritage and its associates had promoted sales of the trusts as vehicles for high interest Keogh plans and other safe-sounding pension plans. The promoters widely advertised that Heritage was "like a bank," State supervised and with deposits insured by an F.D.I.C. insurance equivalent. Petitioners were assured that a "million dollar bond" protected their investments against the kind of frauds which had been exposed in other Arizona land deals.

To create this assurance Heritage negotiated with Reliance Insurance Company (Reliance), a multi-state liability insurance company. Reliance issued a liability policy, called a "Commercial Blanket Bond," ostensibly protecting trustors against any loss from any fraudulent or dishonest act by any Heritage employee—the "million dollar bond."

Thereby trustors were induced to entrust their funds in the individual "revocable inter vivos trusts." These funds were then pooled by Heritage and placed in thirty-four major "Trust Accounts" which were used to buy interests in the Arizona desert, unsecured notes in Mexico and other misrepresented schemes. Twenty of the major Trust Accounts, without the knowledge of trustors, were used to finance absurdly inflated "wrap around" third mortgages

and notes on property in Texas, with undisclosed finder's fees and kickbacks to Heritage. (The land speculators had been enjoined from selling such land interests directly to the public; they conjured up this indirect way of doing it through Heritage.)

In July, 1974, the United States Securities and Exchange Commission brought an action against Heritage and its officers charging fraud and violation of securities laws, a "Ponzi-like" scheme to entrap unsophisticated investors. Reliance cancelled its bonded insurance policy August 15, 1974. The United States District Court for the District of Arizona entered judgment finding fraud by Heritage, in July, 1975 (S.E.C. v. Heritage Trust Company et al., 402 F. Supp 744, 1975).

The District Court ordered copies of the judgment sent to trustors so they could determine their legal remedies. A copy was received by the Hatches in September, 1975. By phone calls, letters and travel to Phoenix they were unable to locate "their" lots in the desert, to learn anything about the "million dollar bond," or any other details of their trust investments except that they could not revoke their "revocable trusts."

On December 16, 1975 the Hatches filed suit against Heritage, its officers and associates in the District Court of Galveston County, Texas. Defendants refused to accept service forwarded by the Secretary of State of Texas under the long arm statute. Judgment for the Hatches was awarded on March 5, 1976, on findings by the State Court that defendants had committed fraud and violations of twelve felony statutes of Texas.[1]

Plaintiffs/petitioners served executions on defendants in the State Court case who had left Arizona and become residents of Texas. Executions were returned unsatisfied. In December, 1976 Petitioners attorney learned details of

1. Case No. 114,361

the Reliance insurance policy from the file in a case brought by the Heritage Receiver against Reliance in the Maricopa County Court, Phoenix. On March 30, 1977 Petitioners served a writ of garnishment on Respondent Reliance to impound funds allegedly owing by Reliance to Heritage, the judgment debtor of the Hatches.[2]

Reliance denied any liability to third parties, thus adding the issue of potential trustor claims to the case. Such claims were reserved by Petitioners for amendment of their State Court complaint, pending rulings on the garnishment issues.

After seven months of pretrial proceedings in the State Court, Respondent Reliance removed the case by filing an action in the nature of interpleader in the United States District Court for the District of Arizona (the Arizona District Court), Case No. 77-843-PHX-WEC (later changed to VAC), enjoining state court proceedings. Petitioners and Respondent mutually agreed not to proceed in the State Court pending the interpleader proceedings on the controversy between them (Appendix V). The Arizona District Court denied plaintiffs' motion for declaratory judgment on the sole issue of garnishment, ruled that "garnishment was the only claim of the Hatches included in the interpleader complaint" (Appendix F), and dismissed the Hatches without prejudice as to their other claims which had been alleged in the interpleader court's pretrial Order.

Termination of interpleader litigation between Petitioner and Respondent, and the court's finding, in effect defining the scope of the ambiguous interpleader injunction and the interpleader surety bond posted by Reliance, seemed to release Petitioners to pursue other remedies growing out of alleged wrongs committed by Reliance. They resumed their action in the State Court.

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2. Case No. 114,361A

Facts Material to Consideration of Questions Presented in This Petition

Following the final proceeding in the interpleader action—June 6, 1982 denial by the Supreme Court of Petitioners' petition for rehearing of their petition for certiorari on the issue of garnishment (Supreme Court No. 81-1704)—the case sub judice was filed, on instructions by the State Court (Appendix U) on August 7, 1982 in the State Court.[3] Jury trial was requested and fee paid (March, 1983) (Initial complaint—Appendix R).

On September 9, 1982, the Houston attorneys for Reliance filed a petition for removal of the case, on grounds of diversity, to the United States District Court for the Southern District of Texas, Galveston Division (the Galveston District Court). For purposes of this Petition the Galveston District Court is the court of first instance (Case No. 82-358).

Consideration of the propriety of removal was undertaken by the Galveston District Court based on a declara-

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3. Case No. 123,723. The complaint (Appendix R) included Cause I—an attempt to obtain review of due process in the interpleader proceeding–and Cause II., containing three counts in tort and two contract-related counts: third party beneficiary and cestui que trust. The Phoenix attorneys for Reliance filed a motion in the interpleader court for the Hatches to show cause why they should not be held in contempt for resuming their action in the State Court. In the first show cause hearing (transcript, January 11, 1983) the Arizona District Court suggested that plaintiffs' attorney was in contempt for bringing the due process charges over which the State Court lacked jurisdiction. The Court also found questionable the two contract-related counts, feeling that such counts had been adjudicated by virtue of a settlement between Reliance and the Receiver for Heritage, the remaining parties in the interpleader after dismissal of the Hatches. The questionable counts were eliminated by amendment of Petitioners' complaint in the State Court, filed on January 31, 1983 (Appendix S). The amended complaint was also filed, February 18, 1983, with motion for leave to file in the Galveston Federal Court (Appendix S-1). At hearing on April 25, 1983 the "Show Cause" Judge found Petitioners' attorney in contempt as suggested in the January 11, 1983 hearing, but found that he had purged his contempt by removing the questionable counts. On July 8, 1983 the Court issued its Order purging Petitioners' attorney of contempt (Appendix E). Also, please see affidavits by attorney to the Court, (Appendix L, M, N).

tion by Reliance in its removal petition: "This court has original jurisdiction over the action by virtue of diversity of citizenship, 28 U.S.C. § 1332(a)(1)." The removal petition omitted factual allegations as to the value of the amount in controversy (Appendix O).[4]

Petitioners moved in the Galveston District Court for dismissal of the removal petition and for remand to the State Court on the grounds that the removal petition was defective for want of any factual allegations showing diversity, and that the attempted removal was proscribed as a second removal of the same cause of action.[5]

Petitioners then amended their State Court complaint to comply with suggestions by the Show Cause Court at oral hearing on January 11, 1983. The amended complaint was filed by the State Court on January 31, 1983 (Appendix S). The record shows (Appendix S-1) that the amended complaint was submitted with motion for leave to file in the Galveston District Court on February 18, 1983.[6] Respondent opposed the motion.

Respondent Reliance subsequently submitted two a-

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4. As of the time of filing this petition a copy of the Removal Petition itself cannot be found in the files of the District Court of Galveston County. The clerk of that court, on request of Petitioners has sent a certified copy of the only document on removal found of record in the State Court: A notice of filing of Petition for Removal. A deputy clerk apparently mistook the notice as a Petition for Removal and docketed it as such. Respondent also failed to file its amended Removal Petitions in the State Court.

5. Finding the removal petition defective on its face the State Court at hearing April 4, 1983 and rehearing April 18, 1983, so Ordered (Appendix I, J, K, K-1). Respondent moved for an Order by the Galveston District Court to stay the State Court hearings and rulings. The Stay Order was not granted (the case had not been properly removed from the State Court). The State Court judgment was cited to the Galveston District Court by petitioners' motion of June 23, 1983 and to the Appeals Court in petitioners' brief and reply brief. The Federal Courts in their opinions ignored the State Courts finding.

6. Under Fed. R. Civ. Proc. Rule 15(c) and Texas Rule 65 the substituted instrument takes the place of the original and relates back to the date of the original pleading.

mended removal petitions with motions for leave to file—docketed March 1, 1983 and May 18, 1983—adding factual allegations to show diversity of citizenship, but still omitting any factual allegations as to the value of the matter in controversy, stating only, "The amount in controversy herein, excluding interest and costs, exceeds $10,000." (Appendix P and Q)

After finding that the earlier removal petitions were defective (Appendix H), the second amended petition for removal was accepted by the Galveston District Court on June 29, 1983. On that date Petitioners' motions to remand were denied, the case was removed (improvidently) from the State Court, and venue was transferred to the Arizona District Court. Also, on June 29, 1983 the Galveston District Court (Appendix G) approved as proper the parties and 3-count cause of action in tort as set forth in Petitioners' first amended complaint; disapproved adding a second defendant as in Petitioners' second amended complaint (which also eliminated the questionable counts)—not material herein;[7] and ordered Petitioners to file a complaint identical to the first amended complaint submitted on February 18, 1983. Compliance with such order was stated in Petitioners' Fed. R. Civ. Proc. Rule 59(e) motion for consideration, but the motion was returned unfiled with a clerk's note that the court no longer had the file in the case (Appendix Z). (The file was shipped to Phoenix on the very day of the June 29, 1983 orders.)

The first amended complaint was then submitted to the Arizona District Court. The complaint was a copy of the amended complaint filed in the State Court, with State

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7. Petitioners moved in the United States Court of Appeals for the Fifth Circuit for a writ of mandamus. This was denied by return mail. Petitioners then filed a petition for writ of certiorari by this Court on the sole issue of adding a second indispensable conspirator in a charge of conspiracy. (The Criminal Code has since been amended to permit a charge of conspiracy against only one defendant, but this probably doesn't affect civil conspiracy.) This Court denied the petition (Supreme Court No. 83-644).

Court caption, since Petitioners were still contending that the State Court had jurisdiction and the case should be remanded. However, to comply with the Galveston District Court order and to propitiate the Arizona District Court, Petitioners offered to adapt the complaint in any way suggested, if necessary to bring it into accord with the Arizona District Court's rules (as the record shows).

As stated, in its removal petition Respondent alleged no facts to support a showing of 28 U.S.C. § 1332(a)'s requirement of minimum jurisdictional amount in controversy. Nothing in the pleadings or other records in the State Court shows a basis for federal jurisdiction. In their State Court complaint (Appendix R and S) Petitioners prayed for recovery of "losses represented by the Hatches' final judgment against Heritage in Case No. 114,361, other judgments by trustors and other losses of trustors provable by the records of Heritage Trust Company or by individual trustors—the total estimated losses being the sum of at least seven million dollars." Neither the parties hereto nor the District Courts broke down the aggregated figure into the amounts alleged owing to individual trustors in their common cause of action against Respondent.

The Galveston District Court considered only jurisdictional issues concerning diversity of citizenship; and transfer of venue. That Court did not go into the question of whether the suit was a class action, but accepted it as a representative suit as it was brought and accepted in the State Court. The Arizona District Court ordered a hearing on the class action question. In response, Petitioners moved for a declaration of class action and certification of the class. The Arizona District Court denied the motion.

Petitioners' motions in the Arizona District Court attached a summary of trustors' claims as set forth in reports sent to Petitioners by the Heritage Receiver (and furnished to Reliance in response to interrogatories in the Arizona State Court action which was also removed by interpleader). The summary showed 1782 claims by trustors for lost invest-

ments in Keogh retirement plans and other modest plans. Trustors' moneys were pooled by Heritage and placed in thirty-four major Heritage trust accounts totaling more than $8,000,000. Again, neither the parties nor the District Court added the last step in the arithmetic to show the amounts of each individual claim, but it was obvious from the summary and the nature of the "revocable trusts" that many claims would be for far less than $10,000.

The Arizona District Court dismissed the entire case with prejudice, advised Petitioners that their only recourse was to appeal to the Ninth Circuit, and ordered Petitioners' attorney not to proceed in Texas or any other State under threat of contempt (Appendix C and D).

Petitioners followed the District Court's advice and appealed to the United States Court of Appeals for the Ninth Circuit (the Appeals Court). Respondent in its Brief on appeal failed to state any grounds for Federal District Court or Appeals Court jurisdiction, although such grounds are required to be stated by Ninth Circuit local rule. The omission by Respondent alerted Petitioners to analyze the individual claims behind the total aggregated amount of $8,087,063. In their Reply Brief to the Appeals Court and at oral argument Petitioners showed that 93.6% of trustors' claims averaged $3872. (The exhibit showing the average of all claims to be $4538 is attached hereto as Appendix T.) Petitioners explicitly contended that, therefore, Federal jurisdiction of the cause of action, as filed and amended in the State Court, was lacking under § 1332(a), citing pertinent cases.

At the oral argument on February 15, 1985 before the Appeals Court three-judge panel, Petitioners presented additional proofs to show that most of the claims were below the jurisdictional minimum as a legal certainty. The Appeals Court did not dispute this showing, and Respondent did not present any data disproving Petitioners' argument. (Petitioners' request for a transcript of the hearing was refused by the panel.)

On April 16, 1985 the Appeals Court affirmed the District

Court's judgment and added penalties upon Petitioners and their attorney for bringing what the author of the opinion called a "frivolous appeal" (Appendix A).

Petitioners' timely petition for rehearing en banc was denied by the Appeals Court on July 17, 1985 (Appendix B). This Petition For Writ of Certiorari is respectfully submitted within ninety days of that date.

ARGUMENT

1. Summary

Petitioners respectfully contend that the judgment by the United States Court of Appeals for the Ninth Circuit, affirming the decision by the United States District Court for the District of Arizona to dismiss plaintiffs/trustors' claims with prejudice, represents an incorrect and voidable exercise of Federal jurisdiction in conflict with decisions of this Honorable Court.

As set forth in the Statement of the Case above, petitioners' case was filed and accepted in the State Court as a representative suit by named plaintiffs on their own behalf and on behalf of other similarly defrauded trustors with individual claims arising from alleged common wrongs by respondent/defendant. Respondent's petition for removal to the Galveston District Court set forth no factual allegations as to the value of the amount in controversy. The case was improvidently removed.

For nine months the Galveston District Court considered only questions of diversity of citizenship and venue. The removal court also did not question the nature of the case as a representative suit and did not inquire as to the amounts of the claims by individual trustors.

The Arizona District Court, to which venue was transferred, rejected petitioners' efforts to show jurisdictional and venue errors by the transferor court. The record shows that the transferee court stated it would not take "horizontal review" of the Galveston proceedings (transcript of status

hearing, March 26, 1984). The Arizona Court, without notice and failing to comply with Fed. R. Civ. Proc. Rule 56, then issued its summary judgment against plaintiffs.

On appeal, the Ninth Circuit Court of Appeals ignored proofs submitted by petitioners on the value of their individual claims and declared that since "the matter was never certified, we are solely concerned with the amount of appellants' claim" (meaning the named plaintiffs and excluding the represented trustors).

If this Honorable Court accepts this petition for writ of certiorari, petitioners are confident that the improvident removal of this case with no showing of jurisdictional amounts in controversy, and the usurpation of State Court judicial proceedings by the courts below will be overruled and the case remanded to the State Court. But if this Court were to deny review, the notation on the published opinion of the Appeals Court—"cert. denied"—will release a torrent of new litigation upon Federal courts.

The rule, long established by this Court, is that a Federal court shall not remove a case from a State court unless the party seeking removal clearly shows that the elements of the case as set forth by the plaintiff warrant Federal jurisdiction.[1]

Denial of this petition would be to proclaim a new rule: that a Federal court to which a case was improvidently removed by a defective petition for removal, may, at any time after such removal, assume functions properly belonging to the State court, interpose conditions not existing at the time of removal, change the parties in the case from those accepted as parties in the State court, and otherwise retrospectively change the nature of plaintiff's State court law suit in order to justify Federal court jurisdiction.

If this Court does not now act to preserve its own interpretations of Constitutional and Congressional limits

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1. The rule dates back at least to 1798 when this Court held plaintiff's declarations to be the only criterion in settling questions of jurisdiction. (*Wilson v. Daniel*, 3 Dall 401, 3 U.S. Bk. 1, L. Ed. 654, page 657.)

on Federal jurisdiction, litigants, perhaps overly sanguine as to their ability to mislead Federal judges, will impose many new removal cases upon the Federal judiciary, in venues sometimes far removed from plaintiffs' chosen forums.

II.
Every Claim in a Common Cause of Action Must Be Shown to Exceed $10,000

The Appeals Court opinion states: "The action was properly removed on grounds of diversity pursuant to 28 US.C. § 1441." Petitioners contend that this conclusion is the basic error on which the Appeals Court rests its judgment.

§ 1441(a) provides for removal of civil actions of which the district courts have original jurisdiction.

Original jurisdiction of civil actions is conferred by two sections of Title 28 of the United States Code: § 1331—Federal Question (not relevant to the instant case); and § 1332—Diversity of citizenship; amount in controversy.

Thus, for an action to be removed "on grounds of diversity pursuant to 28 U.S.C. § 1441," the matter in controversy must exceed the sum or value of $10,000. pursuant to 28 U.S.C. § 1332(a)(1).

Decisions of this Court have consistently interpreted the Congressional intent of § 1332 as meaning that each claim in an action arising from a common wrong must meet the minimum jurisdictional amount and that separate claims by plaintiffs cannot be aggregated by any party to achieve Federal jurisdiction.[2]

In its petitions for removal respondent/defendant alleged, "The amount in controversy, exclusive of interest and costs, exceeds $10,000." This is the only statement by respondent relating to jurisdictional amount. The statement, of course, is a conclusion, rather than a statement of fact. A petition for

2. *Snyder v. Harris*, 1969, 384 US.332, 335, 89 S. Ct. 1053, 22 L. Ed. 2d 319, 323; *Zahn v. Internat. Paper Co.*, 1973, 414 U.S. 291, 94 S. Ct. 505, 38 L. Ed. 2d 511.

removal must aver facts showing jurisdiction, not mere legal conclusions.[3]

The burden is upon the party seeking removal to show such facts, establishing that removal is proper.[4]

III.
Removal Statutes Must be Construed Strictly In Favor of State Court Jurisdiction; State Court Judgments Must Be Honored

Due regard for the rightful independence of State governments requires that Federal Courts scrupulously confine their own jurisdiction to the precise limits which the Congress has defined.[5] State Court judicial proceedings must be given full faith and credit by Federal courts, pursuant to 28 U.S.C. § 1738.

In their complaint brought in the State Court petitioners sought acceptance of the case as a supplement and continuance of their case filed on March 30, 1977. The

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3. *Crehore v. O. & M. Ry. Co.*, 1888, 131 U.S. 240, 244, 245, 33 L. Ed. 144, 145; *Jackson v. Allen*, 1889, 132 U.S. 27, 10 S. Ct. 9, 33 L. Ed. at 249; *Southern Pacific Co. v. Stuart* (1917), 245 U.S. 359, 364, 38 S. Ct. 130, 62 L. Ed. 345, 348 ("Jurisdiction means jurisdiction of the United States District Court as originally invoked.")

4. *Chesapeake & Ohio R. Co. v. Cockrell*, 1914, 232 U.S. 146, 151-152, 34 S. Ct. 278, 279-280, 58 L. Ed. 544, 547, *"It is not enough to allege in terms that this case is removable . . . or otherwise to rest the right upon mere legal conclusions . . . there must be a statement of the facts relied upon and not otherwise appearing . . . Little York Gold Washing & Water Co., 96 U.S. 199, 202, 24 L. Ed. 656, 658; Carson v. Dunham, 121 U.S. 421, 426, 30 L. Ed. 992, 993, 7 Sup. Ct. Rep. 1030; Crehore v. Ohio and M.R. Co., 131 U.S. 240, 244, 33 L. Ed. 144, 145, 9 Sup. Ct. Rep. 692; Powers v. Chesapeake & O.R. Co., 169 U.S. 92, 101, 42 L. Ed. 673, 676, 18 Sup. Ct. Rep. 264."* See also *Wilson v. Republic Iron & Steel Co.*, 1921, 257 U.S. 92, 97, 42 S. Ct. 35, 37, 66 L. Ed. 144, 148; *McNutt v. Gen. Motors Accept. Corp.*, 1935, 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135, 1141, *Phoenix Ins. Co. v. Pechner*, 1877, 95 U.S. 183, 185, 24 L. Ed. at 427.

5. *Shamrock Oil & Gas Corp. v. Sheets*, 1941, 313 U.S. 100, 108, 61 S. Ct. 868, 872, 85 L. Ed. 1214, 1219 (headnote 4); *Victory Carriers, Inc. v. Law*, 1971, 404 U.S. 202, 212, 92 S. Ct. 418, 425, 30 L. Ed. 2d 383, 391, reh. denied; *Milwaukee v. Illinois*, (1981) 451 U.S. 304, 312, 101 S. Ct. 1784, 1790, 68 L. Ed. 2d 114, 123(3).

parties in that case had mutually agreed to suspend proceedings and pass trial in the case for the duration of the interpleader Stay (Appendix V). The supplement added trustors as plaintiffs and added counts which had been reserved in the original garnishment proceedings in the State Court, and arose from the same interlocking series of transactions.

Finding that the removal petition was defective on its face, the State Court continued with its jurisdiction and, at hearing on April 4, 1983, and rehearing on April 18, 1983, adjudged the instant case to be a supplement and continuance of the original case. The State Court ruled that the second removal did not comply with the removal statutes.[5a] (Appendices I, J, K, K-1). (In its June 29, 1983 Order (Appendix H) the Galveston District Court also found the removal petitions defective.)

The Federal courts ignored the State Court's finding, despite the right of the State Court to proceed to make its judgments in accordance with this Court's decisions.

This Court has stated, "The right of removal is statutory. Before a party can avail himself of it, he must show upon the record that his is a case which comes within the provisions of the statute. His petition for removal, when filed, becomes part of the record of the cause. It should state facts, which, taken in connection with such as already appear, entitle him to transfer. If he fails in this he has not, in law, shown to the (State) court that it cannot proceed further with the cause . . .

"Having once acquired jurisdiction, the court may proceed until it is judicially informed that its powers have been suspended."[6]

On the morning of the State Court hearing respondent sought hearing by the Galveston District Court on a motion to Stay the State Court proceedings. The Galveston District Court correctly refused to hear the motion; in light of the

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5a. 28 U.S.C.A. §1652.

6. *Phoenix Insurance Co. v. Pechner*, 1877, 95 U.S. 183, 185, 24 L. Ed. at 427. *Indianapolis v. Chase Nat. Bank*, 1941, 62 S. Ct. 15, 314 U.S. 63, 75, 76, 86 L. Ed. 47, at 53-54. *76 C.J.S. Section 221*, p. 1086, 1087.

defective removal petition, it had not yet determined the propriety of the removal.[7]

Petitioners/plaintiffs' complaint in the State Court also showed no basis for removal of the subject matter to the Federal court. Cause I. of the original complaint was an attempt in good faith to review due process issues stemming from the interpleader proceedings, particularly the impropriety of the Ninth Circuit's Rule 21. The "Show Cause" District Court suggested that to seek State Court jurisdiction to review Federal rulings was improper. Plaintiffs quickly eliminated that cause and two-contract-related counts by amending their complaint in State Court and by filing the amendment with motion for leave to file in the Galveston District Court. The remaining three counts in tort charged respondent with common wrongs for which the individual claims of trustors would be computed at trial on the merits. Since respondent, in the Arizona State Court action by the Heritage receiver against Reliance, in answer to interrogatories, had acquired knowledge of the large number of trustors involved, it is surprising that its removal petition merely stated that the controversy was for an amount in excess of $10,000.

Under the prevailing decisions of this Court the amount in controversy must be determined from the standpoint of the plaintiffs. The plaintiff is the master of his claim.[8]

The textbook authorities are uniform in following this Court's decisions with which the Appeals Court opinion in the instant case conflicts.[9]

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7. *Jackson v. Allen*, 1889, 132 U.S. at 27, 10 S. Ct. 9, 33 L. Ed. 249; *Crehore v. Ohio & Miss. Rd. Co.*, 1888, 131 U.S. 240, 243-4, 33 L. Ed. at 145, 9 Sup. Ct. Rep. 692.

8. *Pirie v. Tvedt* (1897), 115 U.S. 41, 43, 29 L. Ed. at 332; *Great Northern Ry v. Alexander*, 1918, 246 U.S. 276, 282, 38 S. Ct. 237, 240, 62 L. Ed. 713, 716.

9. See *Moore' s Manual-Fed. Prac. & Proc.* Vol. 1 (1984, incl 1985 supplement), Section 5.07, p. 259; 5.08, pp. 263, 265, 266; and Sec. 10.03, p. 611. Also, Vol 14, Wright-Miller-Cooper, Sec. 3705, p. 432 & p. 441.

IV.
Petitioners Could Not Have Brought Their Action In a Federal Court

In its opinion the Appeals Court states: "Appellants, while choosing not to, could have commenced this action in the district court of Arizona."

Petitioners/appellants could not in good faith have brought this action in the Arizona District Court or any other Federal court. Had they done so they would have been subject to penalties set forth in 28 U.S.C. § 1332(b), since they could not have shown that all claims by plaintiffs were for amounts exceeding the $10,000. jurisdictional minimum.[10]

Also, Cause I. of plaintiffs' original complaint, eliminated to comply with the order of the Show Cause Court, could not have been removed under 28 U.S.C. § 1441(c) since it was held that the State Court did not have jurisdiction of that cause. Federal removal jurisdiction derives from State court jurisdiction. If the State Court lacks jurisdiction, the only recourse open to a Federal removal court is to dismiss the cause for lack of derivative jurisdiction.[11]

V.
The Courts Below Lacked Jurisdiction To Determine Class Action Questions

In the footnote to its opinion the Appeals Court states that, since the matter was never certified as a class action, the only claim before the court is that of named plaintiffs. Petitioners assume the Court's conclusion springs from the denial of certification by the District Court.

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10. Plaintiffs and defendant Reliance had received knowledge of the claims from the Heritage receiver (Appendix T).

11. *Lambert Run Coal Co. v. B. & O. RR Co.*, 1922, 258 U.S. 377, 382, 42 S. Ct. 249, 351, 66 L. Ed. 671, 675; *Gen Invest. Co. v. Lakeshore & M.S.R. Co.*, 1922, 260 U.S. 261, 288, 43 S. Ct. 106, 67 L. Ed. 244, 260; *Steele v. G.D. Searles Co.*, 1973, 483 F 2d 339, at p. 342, cert. denied, 1974, 415 U.S. 958, 94 S. Ct. 1486, 39 L. Ed. 2d 572.

But such denial and the entire District Court judgment must fall before the great weight of authority of this Court's decisions that jurisdiction must be determined from the facts of the case as of the time the case is filed; the petition for removal must show that such facts meet Federal jurisdictional prerequisites. Without a conclusive showing that Federal jurisdiction exists, no findings or rulings by the Federal courts are valid, other than an order to remand the case to the State court.

The reasons for the rule have been well and firmly stated by this Court and followed by most Circuits.[12]

"To permit a federal court to enter judgment in a case removed without right from a federal court, where the federal court could not have jurisdiction of the suit even in the posture that it had at the time of judgment, would by act of the parties work a wrongful extension of federal jurisdiction and give district courts the power the Congress has denied them.[13]

Once again the authorities are uniform in following this Court's decisions which nullify the Appeals Court's jurisdictional overreaching.[14]

In a leading case on the point, this Court stated, *"There is no compelling reason for this Court to overturn a settled interpretation of an important Congressional statute in order to add to the burden of an already overloaded Court system."*[15]

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12. *Healy v. Ratta*, 1933, 292 U.S. 263, 270, 54 S. Ct. 700, 78 L. Ed. 1248, 1253; *Jones v. Gen. Tire & Rubber Co.*, 1976, 7th Circ., 541, F 2d 660 at p. 674.

13. *American Fire & Casualty Co. v. Finn*, 1951, 341 U.S. 6, at 18, 71 S. Ct. 534, 95 L. Ed. 702, 710-711; *Mansfield, Coldwater & Lake Mich. Ry. v. Swan*, 1884, 111 U.S. 379, 382, 4 S. Ct. 510, 511, 28 L. Ed. 462; *Owen Equipment and Erection Co. v. Kroger*, 1978, 437 U.S. 365, 372, 98 S. Ct. 2396, 57 L. Ed. 2d 274, 281.

14. *76 CJS Sec. 240*, p. 1107, "If the court's jurisdiction was in fact lacking at the time of removal . . . any findings or orders made by it, other than an order to remand, are null and void." Vol. 1 *Moore's Manual (1984)* Sec. 5.01, p. 242; and Section 8.08.

15. *Snyder v. Harris*, 1969, 394 U.S. 332, 341, 89 S. Ct. 1053, 22 L. Ed. 2d 319, 327.

Petitioners submit that there is at least one "compelling reason" for this Court to order remand of the instant case. If the Ninth Circuit opinion is allowed to stand by denial of this petition, that Circuit will be the first to be granted a power not now assumed by any other court.[16] Law review authors and other analysts may reasonably suggest that other Federal courts are now free to reach into State court proceedings, extract cases without regard to 28 U.S.C. § 1332, and then proceed to apply Federal rules to convert the State causes into different actions from those brought by plaintiffs.

In Snyder this Court also states (394 U.S. p. 336-40, 22 L. Ed. 2d, p. 324-326), *"The doctrine that separate and distinct claims could not be aggregated was never, and is not now, based upon the categories of old Rule 23 or any rule of procedure. That doctrine is based rather upon this Court's interpretation of the statutory phrase "matter in controversy." The interpretation of this phrase as precluding aggregation substantially predates the 1938 Federal Rules of Civil Procedure,"* (citing Troy Bank v. Whitehead & Co., 1911, 222 U.S. 39, 40, 56 L. Ed. 81, 82, 32 S. Ct. 9; Pinel v Pinel, 1916, 240 U.S. 594, 60 L. Ed. 817, 36 S. Ct. 416); and, 394 U.S. at p. 341, 22 L. Ed. 2d, at p. 327,

"Nor can we overlook the fact that the Congress that permitted the Federal Rules to go into effect was assured before doing so that none of the Rules would either expand or contract the jurisdiction of the federal courts . . ."[17]

Petitioners contend that the Courts below have attempted to use Rule 23 to expand their jurisdiction beyond this

16. Vol 14 Wright-Miller-Cooper, Sec. 3705, p. 432 & 441.

17. Texas Rule 42—Class Actions (Appendix Z) is copied from Fed. R. Civ. Proc., Rule 23. The State Court is quite able to protect the trustors' interests in a class action if it decides that is the best way to manage the representative suit. Respondent's Answer has not been filed in the State Court. When pleadings are complete after remand, the State Court will be able to address the feasibility of a class action, including the competency of the representatives, and their attorney, based on his 45 years of law practice and top corporate management.

Court's clear decisions on Constititutional and Congressional statutory limits.

The Appeals Court did not dispute the proofs submitted to it by petitioners which showed as a legal certainty that 93.6% of trustors' losses averaged only $3661 each. Instead the Courts below attempted to evade the $10,000 jurisdictional test for each claim by interposing Rule 23 and theorizing that, since the class had not been certified, claims of the represented trustors/appellants were not a concern of the Court.

Petitioners were pressured by the District Court to apply there for class certification, despite their continuing protests that the case should be remanded. It was a "Catch 22" situation, since, if the case was not remanded, then petitioners should respond to the District Court's observation that the class had not been certified, since they felt that a class action was in the best interest of named plaintiffs and the represented trustors. But by such response, were they conceding to the Court a jurisdictional right to decide the questions? Petitioners decided to respond, fortified by this Court's decisions that parties cannot waive subject matter jurisdiction, either expressly or by consent.[18]

The rule-making authority is limited by "the inability of a court, by rule, to extend or restrict the jurisdiction conferred by statute."[19]

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18. e.g., *American Fire & Casualty Co. v. Finn*, 1951, 341 U.S. 6 at 17-18, 71 S. Ct. 534, 95 L. Ed. 702, at 710, citing *People's Bank v. Winslow*, 102 U.S. 256, 260, 261, 26 L. Ed. 101, 102. *Vol. 1 Moore's Manual*—Fed. Pract. & Procedure, 1984, Sec. 5.01, p. 242.

19. *Ibbach v. Wilson & Co.*, (1941), 312 U.S. 1, 10, 85 L. Ed. 479, 483, 1 S. Ct. 422.

VI.
This Honorable Court Must Exercise Its Power of Supervision Over the United States Court of Appeals For the Ninth Circuit

Petitioners contend that in its opinion the Appeals Court has flagrantly misstated the facts of this case shown by the record, and has made serious errors of law in a prejudiced effort to justify its decision.

If this petition is granted and this Court directs that the parties brief the laws relating to such issues as limitations (Appendix W), res judicata, failure to state a claim, lack of short and plain complaint, and other points outlined in the twenty headnotes of the published case, petitioners will show that on almost every issue the Ninth Circuit itself has ruled exactly the opposite of the rulings in the instant case. The District and Appeals Court conclusions in this case will totally confuse other courts, litigants and authorities.

The failure of the Appeals Court to follow its own Ninth Circuit decisions cited to the case in petitioners' briefs can only be interpreted as a peculiar animus against petitioners. The injudicious hostility inflicted on petitioners by the District Court and the author of the Appeals Court opinion is revealed in the transcripts of hearings and in the tape-recorded, but not transcribed, hearing on oral argument before the three-judge panel.

Bias is also revealed by

—the punishment of petitioners for bringing a "frivolous appeal" when they had been instructed by the District Court that such an appeal was their only recourse;

—untrue and libellous statements that petitioners' attorney misrepresented facts to the Honorable Valdemar A. Cordova, Judge of the interpleader/Show Cause Court;

—claims that the attorney failed to purge the contempt (despite the Order purging contempt (Appendix E));

—claims that petitioners abusively extended the litigation (this Court could take judicial notice of the common-

place reality that it is not plaintiffs who extend litigation—it is defendants such as respondent who are reluctant to let a matter get to the requested trial by jury);

—and by other false findings contradicted by the record.

What may be the most deceptive, or dyslexic, error by the author of the opinion is his failure anywhere in the opinion to state petitioners' primary count of conspiracy to defraud. Instead he divides the alternative count of negligence into two counts of negligence. (The Show Cause Court considered the three counts viable: abuse of process, conspiracy to defraud, and negligence to defrauded trustors—a different charge than negligence to the alleged co-conspirator, Heritage).

Finally, the Appeals Court upheld the District Court's threat of contempt if petitioners' attorney went back to Texas or any other State on this matter—although there are other remedies to which trustors are entitled—an obvious deprivation of property without due process.

VII.
Conclusion and Relief Sought

Petitioners respect the value of this Court's time. We recommend that the Court investigate what we allege to be extreme departures from the usual course of judicial proceedings by the Appeals Court and its sanction of such departures by the District Court.

To quote the Honorable Chief Justice of this Court: "Unreviewable power is the most likely to self-indulge itself and the least likely to engage in dispassionate self-analysis..."

The Court may well wish sua sponte to correct the biased and erroneous rulings of the courts below.

But our prayer for relief is limited to correcting the wrongful assumption of jurisidiction by the Federal courts, as contended by petitioners in the first five sections of this Argument.

Petitioners, therefore, respectfully pray that this Honorable Court vacate the judgment of the United States Court of Appeals for the Ninth Circuit and Order that Court to remand this case to the State Court—the District Court of Galveston County, Texas.

Signed on 1st Copy

By _____

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APPENDIX A

FILED
APR 16 1985
Phillip B. Winberry
Clerk, U.S. Court of Appeals

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT C. HATCH and CLAUDIA R. HATCH; and TRUSTORS OF HERITAGE TRUST COMPANY,	)	No. 84-1967
	)	DC No. VC 83-1266-PHX-WPC
Plaintiffs-Appellants,	)	
vs.	)	
	)	OPINION
RELIANCE INSURANCE COMPANY and WALTER C. MADSEN, Receiver for Heritage Trust Company,	)	
Defendants-Appellees.	)	

Appeal from the United States District
Court for the district of Arizona
William P. Copple, District Judge,
Presiding

Argued and submitted February 15, 1985

Before: DUNIWAY, HUG, and SKOPIL, Circuit Judges

SKOPIL, Circuit Judge:

This matter is before the court on a number of issues. A recitation of the procedural history of this case will aid in an understanding of the court's resolution of the issues.

I.

In 1972 appellee Reliance Insurance Co. ("Reliance") issued a fidelity bond to Heritage Trust Co. ("Heritage"). The bond, under which Reliance agreed to indemnify Heritage for losses it incurred due to fraud by its employees, was canceled in 1974. By its terms, the bond did not indemnify or run to the benefit of any trustor or investor of Heritage. This is a fact appellants continue to dispute.

In 1975 appellants Robert and Claudia Hatch, trustors of Heritage, brought suit in Galveston County, Texas against Heritage and various Heritage employees alleging interalia fraud. Reliance was not a party to this action. The Hatches had the summons and complaint served on the Texas Secretary of State, and obtained a default judgment against Heritage and its members for more than $129,000.00.

Thereafter, in an unrelated proceeding, the Superior Court of Arizona ("receivership court") appointed a Receiver to take possession and control of the assets of Heritage.

In July 1976 the Receiver filed an action on behalf of Heritage in Superior Court of Arizona seeking to recover on the fidelity bond. The receiver's action alleged fraud by Heritage employees. It also alleged that Reliance negligently issued the bond and negligently failed to discover that Heritage misrepresented the nature of the bond to prospective investors.

After the Receiver instituted the action, the Hatches instituted a garnishment action against Reliance in Galveston County, Texas seeking to recover the amount of their previously entered default judgment from the proceeds of the fidelity bond.

Reliance, faced with potentially inconsistent claims (i.e.,

the Receiver's action and the Hatches' garnishment action), instituted an interpleader action and deposited the full amount of the bond in the United States District Court for the District of Arizona. The Receiver filed an answer requesting a judgment in its favor on the bond. A further request was asserted that the court decline jurisdiction over the claim alleging Reliance's negligence in issuing the bond. The Hatches filed an answer alleging a priority claim to the bond proceeds based on the default judgment and the Galveston garnishment action.

In March 1978 the district court in Arizona entered an order which inter alia (1) permanently enjoined all parties from instituting or proceeding in any suit pertaining to Reliance's liability on the bond, and (2) ordered the interpleader defendants, the Receiver and the Hatches, to litigate all claims pertaining to the bond in the interpleader action in federal district court in Arizona.

The Receiver sought and obtained leave of the district court to amend its answer to add a counterclaim asserting a negligence claim against Reliance. The counter-claim asserted that Reliance was liable to the Receiver, because Reliance knew or should have known of the fraud by Heritage employees, specifically, the employees' misrepresentations to the public concerning the terms of the bond. The Receiver alleged that Heritage investors, like the Hatches, relied on the false representations to their detriment.

In 1980 the Hatches filed a declaratory judgment motion claiming priority in the bond proceeds. The motion was denied. The Hatches' motion for a new trial was also denied. The Hatches appealed to this court. A memorandum disposition was issued affirming the district court. Reliance v. Koeb, No. 80-5277 (9th Cir. Nov. 5, 1981) (unpublished disposition). Appellants' petition for rehearing was denied and the suggestion for rehearing en banc was rejected. The Hatches' petition for a writ of certiorari was similarly denied.

Reliance and the Receiver moved to terminate further participation by the Hatches in the interpleader action. Appellants' counsel opposed the motion and sought to litigate additional claims based on Reliance's alleged negligence in issuing the bond.

In January 1982 judgment was entered terminating appellants' participation in the interpleader action. No appeal was taken from that judgment.

The Receiver and Reliance reached a settlement resolving the remaining claims in the interpleader action. As required by state law, the settlement was submitted to the state receivership court which in turn submitted the settlement to all interested parties. The Hatches filed objections to the settlement. The receivership court denied the Hatches' objections and directed the Receiver to effect the settlement. No appeal was taken from this order. The settlement was consummated and the interpleader action was dismissed with prejudice.

After the denial of their petition for a writ of certiorari from the Ninth Circuit's ruling, the Hatches returned to Galveston County and filed a second state action against Reliance. The Hatches again sought recovery on the bond and further sought to have the Texas court declare the interpleader proceedings null and void. The Hatches specifically requested the state court to declare that rulings of the federal court were "based on gross errors of law by the U.S. District Court for Arizona" which were "compounded by the U.S. Court of Appeals for the Ninth Circuit." The Hatches further maintained that by denying certiorari the "U.S. Supreme Court denied full judicial review" and that "the only available remedy for such injustices on the federal level is for the courts of the sovereign states of the union to reassert jurisdiction."

Reliance sought to have appellants and their counsel held in contempt of the prior order of the district court of Arizona. Reliance further sought removal of the second Galveston County, Texas action to federal district court for

the Southern District of Texas. Appellants opposed removal and sought remand. The Texas district court upheld the removal and further ordered the case transferred, pursuant to 28 U.S.C. § 1404 (a), to the district court in Arizona. Finally, the Texas district court denied appellants leave to amend their complaint to add additional parties but granted leave to amend to remove the contemptuous claims.

The Hatches sought relief from the orders of the Texas district court by filing a petition for a writ of mandamus in United States Court of Appeals for the Fifth Circuit. The petition was denied. Appellants' petition for a writ of certiorari was also denied.

The contempt matter pending in the district court of Arizona was proceeding. Following a show cause hearing and a sanction hearing in the contempt action, appellants were told by the judge that the second Galveston County action was in contempt of prior court orders. Appellants' attorney was told by the judge to withdraw all claims in the Texas court which were contemptuous. Appellants advised the federal district court in Arizona that the Texas court pleadings had been amended in conformance with the court's contempt order. In light of the appellants' attorney's representations that "he had done what he could to comply with orders of this Court," the federal district court in Arizona found that appellants' attorney had purged himself of contempt.

Meanwhile, the transferred action made its way to the district court in Arizona. It showed that despite appellants' attorney's representations to the contrary, appellants had failed to amend their pleadings to remove claims found to be contemptuous.

At a March 1984 status conference held in the transferred action, appellee Reliance contended that all appellants' claims should be dismissed. The court directed Reliance "to file a motion to dispose of this case." As directed, appellee filed a motion to dismiss. Appellants filed a motion for class certification and a motion to produce documents. After a

hearing on the motions, the district court denied appellants' discovery and class certification motions and granted appellee's motion to dismiss. A judgment was entered. This appeal followed.

II.

A. Priority of Removal and Transfer.

Appellants initially claim this court lacks jurisdiction over the appeal because this case was improperly removed from Texas state court and improperly transferred from Texas federal court to Arizona federal court.

There is no indication that this argument was presented to the district court. Matters relating to the subject matter jurisdiction of this court and the district court are nonetheless freely reviewable. Clayton v. Republic Airlines, Inc., 715 F.2d 729, 730 (9th Cir. 1983).

Appellee contends that the propriety of the removal from Texas state court to Texas federal court, and the transfer from Texas federal court to Arizona federal court has been adjudicated by Texas federal district court, by the Fifth Circuit, and by the United States Supreme Court. Whether our consideration of these issues is barred by res judicata or on some other ground is a question of law freely reviewed on appeal. See United States v. McConney, 728 F.2d 1195, 1201 (9th Cir. 1984) (en banc).

Whether appellants may attempt to collaterally attack the propriety of removal and transfer where, as here, prior to transfer, appellants obtained review of the removal and transfer issues by seeking a writ of mandamus from the Fifth Circuit and thereafter a writ of certiorari is a first impression issue in this circuit. But compare Hoffman v. Balski, 262 U.S. 335, 240 n.9 (1960) (suggesting in dicta that a transfer did not preclude transferee court from determining whether it had jurisdiction or venue) with Hayman Cash Register Co. v. Sarokin, 669 F.2d 162 (3rd Cir. 1982) (distinguishing Blaski and barring reconsideration of jurisdiction and venue issues by transferee court where transferor court already

decided the issue) and Skil Corp. v. Millers Falls Co., 541 F.2d 554, 556 (6th Cir.) (same), cert. denied, 429 U.S. 1029 (1976). The better rule is to bar reconsideration of these matters unless there is some indication that appellants were not afforded a full and fair opportunity to litigate these matters before the transferor court. See 1B Moore's Federal Practice Sections (404(1) and 404(8) (2d ed. 1982).

In this case, there are particularly compelling reasons for not allowing relitigation of the issue of the propriety of transfer and removal, appellants having litigated the merits of their case in a federal forum and for a second time in state court. After appellees' removal of the second state court proceeding, appellants vigorously contested such removal and filed a motion for remand. Appellants also objected to appellee's motion to transfer. Having chosen both the time and manner by which they obtained appellate review of the district court's removal and transfer order, appellants should not now be permitted to claim that review was inadequate and nonbinding. Skil Corp., 541 F.2d at 559.

Assuming res judicata is not a bar to reconsideration of allegations concerning the removal and transfer of this matter, both the removal and transfer were proper. This action was properly removed on the ground of diversity pursuant to 28 U.S.C. § 1441. The Hatches resided in the Southern District of Texas, while Reliance has its principal place of business in Pennsylvania. The matter in controversy exceeded $10,000 exclusive of interest.[1]

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1. Appellants raise for the first time in their reply brief the absence of jurisidiction for failure to satisfy the $10,000 jurisdiction amount in controversy. Apparently appellants believe that the jurisdictional amount in this case can be met only by aggregating the claims of the putatitve class members. Since aggregating such claims is not permitted, appellants claim there is no federal jurisdiction. This argument lacks merit.

First, this matter was never certified and we are therefore concerned solely with the amount of appellants' claim. Second, the Hatches had already obtained a default judgment in state court in an amount greater than $10,000. Under these circumstances, we cannot conclude that the amount in controversy is less than $10,000.

This matter was properly transferred pursuant to 28 U.S.C. § 1404(a). When the case was removed to the United States District Court in Texas it became a federal case, and § 1404(a) applied. As the district court noted, § 1404(a) "requires two findings—that the district court is one where the action 'might have been brought' and that the 'convenience of parties and witnesses in the interest of justice' favor transfer." The district court in Texas made detailed findings on both questions. It concluded that the action was properly transferred to the federal district court in Arizona. Appellants' contention that transfer to Arizona was improper because the action could not have been removed there from Texas state court is meritless. In determining whether an action "might have been brought" in a district, the court looks to whether the action initially could have been commenced in that district. See, e.g., Hoffman, 363 U.S. at 343-44; Van Dusen v. Barrack, 376 U.S. 612, 620 (1964). Appellants, while choosing not to, could have commenced this action in the district court of Arizona. Transfer to that district purusant to § 1404(a) was proper.

B. Propriety of Dismissal.

The federal district court dismissed on the grounds that

> The actions are barred by failure to purge himself of contempt and to file as ordered . . . an amended complaint; barred by statute of limitations in tort; barred by res judicata; barred because it fails to state a legal claim and failure to be a plain simple statement of the facts as required by Rule 8 . . .

Appellants challenge the dismissal.

In reviewing a district court's decision to dismiss, the court of appeals may affirm on any ground supported by the record. Salmeron v. United States, 724 F.2d 1357, 1364 (9th Cir. 1983); Angle v. United States, 709 F.2d 570, 573 (9th Cir. 1983). In this case each of the grounds relied on by the district court is sufficient to support dismissal.

The dismissal on the ground that plaintiff failed to purge

himself of contempt was not an abuse of discretion. See, e.g., Schmidt v. Herrmann, 614 F.2d 1221, 1224 (9th Cir. 1980) (reviewing court will overturn lower court's dismissal only where it is left with a definite firm conviction that court below erred); Fendler v. Westgate Calif. Corp., 527 F.2d 1168, 1170 (9th Cir. 1975) (dismissal for failure to obey orders of the court reviewed for abuse of discretion). Appellants filed a second Texas state court action in violation of a previous federal court order. Upon representation of counsel that contemptuous claims had been dropped, the district court issued an order finding appellants' counsel had purged himself of contempt. Despite appellants' counsel's represntations, counsel did not file an amended complaint removing contemptuous claims. The district court did not abuse its discretion in dismissing this matter for failure of appellants' counsel to purge himself of contempt.

Dismissal on limitation grounds was proper. The statute of limitations of both Arizona, Ariz. Rev. Stat § 12-542 (as amended 1978) (two year) and Texas, Tex. Rev. Civ. Stat. Ann. Art. 5526 (Vernon's 1979) (two year) would bar the assertion of the Hatches' claim in this action. The Hatches allege three claims: (1) abuse of process in filing the interpleader action; (2) negligence in issuing the fidelity bond; and (3) negligent failure to discover the fraud of Heritage's employees. The first claim arose in 1977 when the interpleader action was filed, more than five years prior to the commencement of this action. The remaining claims arose more than eight years prior to the commencement of this action.

Dismissal on res judicata grounds was not in error. The tort claims alleged by appellants were pleaded, litigated, and resolved in the federal interpleader action. Those matters may not now be relitigated. Los Angeles Branch NAACP v. Los Angeles Unified School District, 750 F.2d 731, 737 (9th Cir. 1984) (en banc) (applying California law

of res judicata). Accord Flores v. Edinburg Consolidated Ind. School Dist., 741 F.2d 773, 775-76 (5th Cir. 1984) (applying Texas law of res judicata). Appellants' argument that they "reserved" their tort claims in the interpleader action is without merit. The doctrines of collateral estoppel and res judicata were designed to prevent piecemeal litigation. Wright, Miller & Cooper, Federal Practice and Procedure § 4402 at p. 8 (1981).

The district court did not err in concluding that appellants' complaint failed to state a claim. Appellants' allegation that Reliance abused process when it instituted the interpleader action is meritless. Appellee Reliance, faced with two competing claims for the same funds, filed an interpleader action. Interpleader actions were designed to remedy this precise problem. See Gelfgren v. Republic National Life Ins. Co., 680 F.2d 78, 81 (9th Cir. 1982) (discussing interpleader actions generally). There is no abuse of process where a litigant avails him/herself of a remedy designed for the precise problem the litigant seeks to remedy. Appellants' negligence claims relating to the bond are also without merit. Investors in Heritage had no direct claim under the bond. The bond ran to the benefit of Heritage alone. Reliance, if obliged to pay anyone, was obliged to pay Heritage. The Receiver pursued these claims on behalf of Heritage in the interpleader action and prevailed. Appellants do not have a negligence claim.

Finally, the district court's dismissal pursuant to Rule 8 of the Federal Rules of Civil Procedure was not an abuse of discretion. Rule 8 requires a "short and plain" statement of a claim. We reviewed the pleadings and the history of this case and concluded that neither appellants' original nor the proposed amended complaint complied with Rule 8. The district court did not abuse its discretion in concluding the appellants' complaints, which, including attachments, exceeded 70 pages in length, were confusing and conclusory and not in compliance with Rule 8. Nevijel v. North Coast

Life Ins. Co., 651 F.2d 671, 675 (9th Cir. 1981) (dismissal for failure to comply with Rule 8 upheld).

C. Denial of Discovery and Certification Motions.

In addition, appellants challenge the district court's denial of their class certification and their discovery motions. The district court concluded that

> Rule 23(c) requires that I make a finding that the named plaintiffs and their counsel will adequately represent the class. In this particular case, after reviewing all the documents filed by Mr. Cumming, [and] the proceedings . . . I have to find that, because of the total incompetency of counsel, the named plaintiffs cannot adequately represent the class and therefore, I must deny certification of the class, even should such a class exist, and I'm not sure it does.
>
> Among other things, Mr. Cumming on his motion to produce has attempted to use Rule 34(c) to secure documents from a nonparty, indicating in his motion under Rule 34(c) that . . . the receiver really had no opposition to producing documents . . . [T]hen when it is pointed out to Mr. Cumming that Rule 34(c) does not provide for such a request for production from a nonparty he then asserts that by objecting to that party [sic], somehow the nonparty becomes a party and, therefore, comes under Rule 34(c), which is a unique position, I suggest.

The motion to produce is denied.

A district court's rulings concerning discovery are reviewed for an abuse of discretion. Ellis v. Brotherhood of Ry's, Airline, and S.S. Clerks, 685 F.2d 1065, 1071 (9th Cir. 1982). A district court's denial of class certification is reviewed for an abuse of discretion and application of impermissible legal criteria. Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 479 (9th Cir. 1983).

Counsel's performance in these proceedings demonstrates an inability to adequately and competently represent a single plaintiff, much less a class of plaintiffs. See Fendler, 527 F. 2d at 1170 (court may look to the quality of counsel's presentation of the case). Since 1979 appellants' counsel has attempted to relitigate an issue litigated and finally decided in the federal interpleader action. Counsel has ignored prior court orders and has been held in contempt. Without engaging in an exhaustive recitation of counsel's error in these proceedings, we conclude that the district court did not abuse its discretion in denying class certification.

The denial of the motion to produce was also not an abuse of discretion. It was within the district court's discretion to deny appellants' counsel's attempt to obtain production under Rule 34 of the names of similarly situated investors in order to solicit support for his efforts to certify the class. See Kline v. Coldwell, Banker & Co., 508 F.2d 226, 237 (9th Cir. 1974) (separate opinion of Duniway, J.). Moreover, Rule 34 may not be used to discover matters from a nonparty. Fed. R. Civ. P. 34.

D. Sanctions.

Fed. R. App. P. 38 provides:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

While appellees have not moved for sanctions, we believe this is an appropriate case for their imposition. See 28 U.S.C. § 1912; Nevijel, 651 F.2d at 675.

This litigation has been ongoing for more than nine years. By filing this case in the Texas state court, by maintaining it in the federal district court, and by taking and prosecuting this appeal, appellants' counsel has grossly abused the judicial process. Appellants' counsel's persistent attempts to relitigate matters previously and finally determined

demonstrate either a lack of understanding or a flagrant disregard of fundamental principles of res judicata and federalism. Counsel has ignored prior court orders and the Federal Rules of Procedure. Appellees have expended large amounts of time and money defending against the numerous and poorly drafted pleadings filed by appellants in this and related proceedings. The right of these defendents to be free from this costly litigation and the rights of other litigants must be considered. Id. The instant appeal is frivolous.

We award double costs to appellee, with that amount to be paid by the Hatches. In addition, appellees are awarded attorney's fees for defending their appeal, with that amount to be paid by Mr. Cumming, attorney for the appellants. Appellees should file a timely bill of costs and application for attorney's fees. See Ninth Circuit Rule 14; Oliver v. Mercy Medical Center, Inc., 695 F.2d 379, 382 (9th Cir. 1982). Appellants should file any objections to the request within 14 days after the service of the request.

AFFIRMED.

APPENDIX B

FILED
JUL 17 1985
Phillip B. Winberry
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT C. HATCH and CLAUDIA R. HATCH; and TRUSTORS OF HERITAGE TRUST COMPANY,	)	
Appellants,	)	No. 84-1967
vs.	)	DC No. CV 83-1266-PHX-WPC
RELIANCE INSURANCE COMPANY and WALTER C. MADSEN, Receiver for Heritage Trust Company,	)	ORDER
Appellees.	)	

Appeal from the United States District
Court for the District of Arizona
William P. Copple, District Judge,
Presiding

Before: DUNIWAY, HUG, and SKOPIL, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is denied, and the suggestion

for rehearing en banc is rejected.

The panel is in receipt of the appellee's application for attorney's fees. Appellants are granted 10 days from the date of this order to respond to the application for fees.

APPENDIX C

JUDGMENT ON DECISION BY THE COURT
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ROBERT C. HATCH, et ux,	)	
	)	
Plaintiff,	)	
	)	CIV-83-
	)	1266-PHX.
	)	WPC
RELIANCE INSURANCE	)	
COMPANY	)	Judgment
Defendant.	)	
	)	

This action came on for (hearing) before the Court, the Honorable Wm. P. Copple, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the complaint and action are dismissed in all respects, with prejudice. The Court orders pltf. not to file action in Texas.

FILED APRIL 30 1984
DATED AT PHOENIX, ARIZONA,
THIS 30th DAY OF APRIL, 1984
W.J. FURSTENAU, CLERK

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ROBERT C. HATCH and CLAUDIA R. HATCH; and TRUSTORS OF HERITAGE TRUST COMPANY,	)	FILED MAY 9, 1984
Plaintiffs,	)	
vs.	)	Civ. 83-1266 Phx. WPC
RELIANCE INSURANCE COMPANY,	)	
Defendant.	)	

TRANSCRIPT OF MOTION HEARING
Before: HON. WILLIAM P. COPPLE, JUDGE
PHOENIX, ARIZONA, APRIL 30, 1984, 10:00 a.m.

Appearances:
For the Plaintiffs:
Mr. Robert B. Cumming
383 N. Roberts Way
Camano Island, Washington 98292

For the Defendent:
Jennings, Kepner & Haug
800 Ariz. Title Bldg.
Phoenix, Arizona 85003
By Mr. Jack R. Cunningham

For the Heritage Trust Receivership:
Beer & Toone
216 Luhrs Bldg.
11 West Jefferson
Phoenix, Arizona 85003
By Mr. Paul Beer

Thomas G. Stalcup, Official Reporter
1428 Federal Bldg.
Phoenix, Arizona 85025

* * *

THE COURT: Mr. Cumming? Do you have anything to add, Mr. Cumming?

MR. CUMMING: First of all, Your Honor, the stenographer's record in the contempt proceedings will show Judge Cordova specifically said the three counts that I have raised are viable. That has been ruled. These counts—

THE COURT: I think what he held was that they were outside of the — that some of them were outside of the injunction.

MR. CUMMING: That was his original ruling when we were dismissed from the interpleader case.

THE COURT: Well, that is an entirely different thing from his saying that they are viable.

MR. CUMMING: Yes, Your Honor, but in the contempt proceeding he went beyond that. He said that garnishment was the only issue. Therefore, on my new petition, which is based upon several cases including the Aetna case which I have here somewhere, stating interpleader complaints could properly be enjoined during pendency of instant action in order to permit determination of appropriate distribution of proceeds from fund deposited in court and to avoid multiple vexatious litigation as to fund, but statutory interpleader is not an all-purpose bill of peace and cannot be

invoked to prevent claimants who have filed timely in state court against insurers' other assets from going forward with such actions, if they so desire, at the conclusion of action in nature of interpleader. That is Aetna Casualty versus Ahrens, 1975, Supreme Court, Texas; 414 Fed. Supplement 1235.

There are several other cases to that nature.

We observed scrupulously the interpleader injunction until it was determined by the court just what that injunction applied to. When it was determined by Judge Cordova that the posted bond and the interpleader proceedings, themselves, did not extend to other claims which we had raised in the original state court action and which, again in the pretrial order which was made part of the pleadings of the interpleader action, we had spelled out, naming the claims of our present petition.

When we realized the injunction did not apply to those, we proceeded to resume our state court action.

Limitations, of course, are tolled during the period of the interpleader injunction and had never been raised before.

If you like, I can read you the pretrial reservations and statement of our claims.

* * *

And then when it is pointed out to Mr. Cumming that Rule 34(c) does not provide for such a request for production from a nonparty, he then asserts that, by objecting to that party, somehow the nonparty becomes a party and, therefore, comes under Rule 34(c), which is a unique position, I suggest.

The motion to produce is denied.

And as to the motion to dismiss, the actions are barred by failure to purge himself of contempt and to file, as ordered by Judge Gibson, an amended complaint; barred by the statute of limitations in tort; barred by res judicata; barred

because it fails to state a legal claim and failure to be a plain, simple statement of the facts as required by Rule 8 of the Federal Rules of Civil Procedure as to both the proposed complaint which he never failed, although having been ordered to do so, and the complaint which was filed in contempt of court in Texas.

Therefore, the clerk will enter judgment dismissing the complaint and action in all respects, the entire case, with prejudice.

Now, Mr. Cumming, you have the right to appeal that ruling to the Ninth Circuit, but if you go back to Texas or to any state court and refile the same thing, you're going to be back here for contempt of court because I am ordering you not to do it. Your only relief is for appeal to the Ninth Circuit.

MR. CUMMING: Your Honor, I do not feel that we have had a trial of the — particularly the abuse of process.

THE COURT: Well, you have heard the orders of the court, Mr. Cumming. We will stand adjourned.

(Proceedings concluded.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Thomas G. Stalcup
Official Reporter
5/8/84

APPENDIX E

FILED
JULY 8 1983
W.J. Furstenau,
Clerk, U.S. District Court
for
the Dist. of Arizona
by _____ Deputy Clerk

FOR THE DISTRICT OF ARIZONA

RELIANCE INSURANCE COMPANY, a corporation,	)	
PLAINTIFF,	)	No. CIV 77-843 PHX VAC
vs.	)	
RICHARD W. KOEB, as Receiver for Heritage Trust Company; ROBERT C. HATCH, et al,	)	
DEFENDANT.	)	

Mr. Robert B. Cumming has timely filed with this Court an affidavit of the actions taken by him to purge himself of the contempt order of April 25, 1983. The matters set forth in the affidavit satisfy the Court that Mr. Cumming has done what he could to comply with the orders of this Court.

IT IS THEREFORE ORDERED that the Court finds Mr. Robert D. Cumming has purged himself of the Order of Contempt.

Further, under the present circumstances, the Court decides not to make an award of attorney fees on this

occasion against Mr. Cumming for his misguided and overzealous acts in behalf of his clients.

Valdemar A. Cordova
U.S. District Judge

cc: all counsel

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

RELIANCE INSURANCE CO.,	)	DATE 1/12/82
	)	FILED JAN. 14, 1982
PLAINTIFF,	)	No. CIV 77-843
	)	PHX VAC
vs.	)	
ROBERT C. HATCH, et al,	)	
DEFENDANT.	)	

This matter is before the Court on plaintiff's motion to terminate further participation in this cause by defendants Hatch. The request for oral argument on the motion was withdrawn on January 6, 1982 and the parties agree that the motion may be submitted on the pleadings and memoranda of the parties.

It appears to the Court that the Hatches' only claim in this case relates to the effect of the Texas garnishment proceeding on the plaintiff Reliance. This is the only claim included in the interpleader complaint or in the Hatches' answer filed December 13, 1977.

On Feburary 6, 1980 this Court ruled that the garnishment proceeding did not result in a valid attachment of any debt owed by Reliance to Heritage. The Ninth Circuit affirmed on Novmber 5, 1981 in an unpublished memorandum opinion which stated, "this Court is satisfied that the judgment appealed from disposes of the Hatches' claim against Reliance in this interpleader action." The Hatches' petition for rehearing was denied and their suggestion for rehearing en banc was rejected in an order filed December 23, 1981.

THEREFORE, IT IS ORDERED granting plaintiff's motion to terminate further participation in this cause by defendants Hatch. There appearing no just reason for delay, it is further ordered directing plaintiff to prepare and submit to the Court a judgment consistent with the above.

Valdemar A. Cordova
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ROBERT C. HATCH, et al	)	FILED JUN 29, 1983
	)	
Plaintiffs	)	CIVIL ACTION
	)	
v.	)	No. G-82-358
	)	
RELIANCE INSURANCE COMPANY	)	
	)	
Defendant	)	

ORDER

* * *

The original complaint, in those counts not in contempt of the Arizona court order, alleged against Reliance that an interpleader action filed by Reliance was an abuse of process, that Reliance conspired with Heritage to defraud Heritage investors, and that Reliance negligently issued its bond of indemnification to Heritage. In their proposed amended complaint, plaintiffs have alleged only those counts; thus in that respect, the Court finds the amendment proper.

* * *

Accordingly, it is ORDERED, ADJUDGED and DECREED that plaintiffs' motion to amend is GRANTED in part and DENIED in part; plaintiffs' motion to amend the

complaint so that it comports with the prior court order is GRANTED; and plaintiffs have ten (10) days to file an amended complaint without adding parties defendant, unless prior permission of the Court is obtained.

DONE at Galveston, Texas, this 29th day of June, 1983.

/s/ HUGH GIBSON
United States District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ROBERT C. HATCH, et al	)	FILED
	)	JUNE 29, 1983
Plaintiffs	)	CIVIL ACTION
	)	No. G-82-358
v.	)	
RELIANCE INSURANCE COMPANY	)	
	)	
Defendant	)	

ORDER

BEFORE THE COURT are three motions and responses in opposition concerning the validity of the removal of this diversity action from state court. Although plaintiffs have buttressed their motion to dismiss and motion to remand with other arguments, principally their contention centers on the sufficiency of the jurisdictional allegation in the petition for removal. In pertinent part the petition appears lacking because it does not set forth when defendant, Reliance Insurance Company (Reliance), obtained its citizenship for the purposes of diversity jurisdiction. Defendant moves to amend its petition to set forth these details.

The Fifth Circuit has held that the failure to allege citizenship at the time the suit was brought and at the time the petition was filed is not fatally defective and may be cured by an amended petition, even at the appellate stage. *See D.J. McDuffie, Inc. v. Old Reliable Fire Insurance*, 608 F.2d 145, 146-47 (5th Cir. 1979), *cert. denied*, 449 U.S. 830 (1980). *Accord Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 637 F.2d 391, 396 n.9 (5th Cir. 1981).

* * *

APPENDIX I

IN THE DISTRICT COURT OF
GALVESTON COUNTY, TEXAS
212TH JUDICIAL DISTRICT

ROBERT C. HATCH, ET AL	)	FILED APR 26, 1983
	)	GALVESTON
Plaintiffs,	)	COUNTY,
	)	TEXAS
VS.	)	
	)	CAUSE NO.
RELIANCE INSURANCE	)	114,361-A
COMPANY,	)	
	)	
Defendant.	)	

ORDER

The Court having reviewed defendant Reliance Insurance Company's Motion for Reconsideration of Orders Entered on April 4, 1983, and having heard the arguments of counsel with regard to that motion on April 18, 1983, finds that:

Plaintiff did not comply with Rule 165a with regard to the procedural requirements for reinstating a case which had been dismissed for want of prosecution, nor did this Court have jurisdiction to order reinstatement since more than six months have elapsed since the case was dismissed on January 26, 1981;

NOW THEREFORE, it is hereby ORDERED that the order entered by this Court on April 4, 1983 in Cause No. 114,361-A which reinstated Cause No. 114,361-a, a copy of which is attached hereto as Exhibit A, is hereby vacated, null and void, and of no effect;

IT IS FURTHER ORDERED that defendant's motion for reconsideration is DENIED with regard to the other

three orders entered by this Court on April 4, 1983 in Cause No. 123, 723 and Cause No. 114, 361-A, copies of which are attached hereto as Exhibit B, Exhibit C and Exhibit D.

SIGNED and ENTERED on this 26th day of April, 1983.

Don. B. Morgan
JUDGE PRESIDING

APPENDIX J

IN THE DISTRICT COURT OF
GALVESTON COUNTY, TEXAS
212th JUDICIAL DISTRICT

ROBERT C. HATCH and CLAUDIA R. HATCH; and TRUSTORS OF HERITAGE TRUST COMPANY,	)	No. 123, 723 and No. 114, 361-A
Plaintiffs,	)	
vs.	)	
RELIANCE INSURANCE COMPANY,	)	
Defendant.	)	

ORDER

This matter is before the court on motion by plaintiffs to confirm jurisdiction of this court in this cause. An effort has been made by a defective petition for removal filed by defendant to remove this cause from this state court to the United States District Court for the Southern District of Texas, Galveston Division. The cause has not been properly removed.

Following hearing, the court finds that the record of this case and the petition for removal contain no facts supporting transfer of this cause to the federal court. The filing of a notice of removal does not operate to deprive this court of its original jurisdiction, since the cause, reset as No. 123,723, is the same cause as No. 114,361 A, arising from the same transaction alleged throughout proceedings in this court initiated on March 30, 1977 and still pending. As

previously ordered by the court, Case No. 114,361 A was, through error, placed on the drop docket and, through error, was dismissed without notice to plaintiffs. Files of the ongoing action have been consolidated by this court, but out of respect for the federal court the two cases are being heard and litigated separately until that court removes or remands Case No. 123,723.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED:

Defendant's petition for removal of this case does not remove jurisdiction of this cause from this court inasmuch as it was not filed within thirty days of service of process on defendant on or about April 1, 1977.

SIGNED
Don B. Morgan
Judge

April 4 11:00 a.m. 1983
By Deputy

APPENDIX K

IN THE DISTRICT COURT OF
GALVESTON COUNTY, TEXAS

APR 4 10:59 AM 1983
GALVESTON COUNTY, TEXAS
BY DEPUTY

ROBERT C. HATCH and CLAUDIA R. HATCH,	)	
Plaintiffs,	)	No. 114,361 A
vs.	)	
RELIANCE INSURANCE COMPANY,	)	IN THE DISTRICT COURT OF GALVESTON COUNTY, TEXAS
Defendant.	)	

ORDER

The court has reviewed the file in the above-styled and numbered cause and having considered the record in said cause this court finds that:

Case No. 114,361 A was filed herein on March 30, 1977. On November 21, 1977 the case was stayed by the court on motion by defendant until federal interpleader proceedings were terminated. Plaintiffs were also barred from proceeding further in this court by injunction issued by the U.S. District Court for the District of Arizona. The cause was removed to that court under the federal interpleader statute, 28 U.S.C. § 1335. The case was placed on this court's drop docket for lack of prosecution through error since plaintiffs were enjoined from further prosecution and never abandoned prosecution as contemplated in the drop docket procedures. Through further error notice of dis-

missal of the case for lack of prosecution was not given to plaintiffs, said notice having been mailed to plaintiffs' attorney's former Houston office address of three years previous, despite the then current address of said attorney being clearly indicated on the file of the case.

The court further finds that the federal interpleader action has terminated. The stay by this court therefore also has terminated and proceedings herein may be resumed.

NOW THEREFORE, after consideration of the errors and the hardship caused to plaintiffs by such errors, IT IS HEREBY ORDERED:

that Case No. 114,361A be and hereby is reinstated and reset for further proceedings in this court.

It is the further opinion of this court that this case has been supplemented by Case No. 123,723 filed by plaintiffs pursuant to advice from the court and that the two cases are part of the same cause of action. However, until the U.S. District Court-Galveston Division reaches a similar decision in the present proceedings brought by defendant to remove Case No. 123,723 to federal jurisdiction, the court will adjudicate and proceed in each case as a separate cause.

SO ORDERED.

SIGNED
Ron B. Morgan
Judge

APPENDIX K-1

IN THE DISTRICT COURT OF
GALVESTON COUNTY, TEXAS
212th JUDICIAL DISTRICT

ROBERT C. HATCH and CLAUDIA R. HATCH,	)	
Plaintiffs,	)	No. 114,361 A and No. 123,723
vs.	)	
RELIANCE INSURANCE COMPANY,	)	
Defendant.	)	

ORDER

This matter comes before the court on motion by plaintiffs to declare void the interpleader bond with surety posted by defendant in the U.S. District Court for the District of Arizona to remove jurisdiction from this court to the federal court. After consideration of the pleadings herein and after oral hearing the court finds as a matter of law that United Pacific Insurance Company and Reliance Insurance Company are the same corporate person. Defendant has submitted no authorities or precedents to contradict the age-old common law and common sense rule that, in suretyship, there must be two separate persons—a principal and surety. A person cannot be a surety on his own bond. The single entity, known as United Pacific/Reliance Insurance company, cannot be a surety on its own bond, as it attempted to be when it issued the interpleader bond in the name of Reliance and executed the surety obligation in the name of United.

WHEREFORE, PREMISES CONSIDERED, jurisdiction of this court being recognized by 28 U.S.C. § 1352 in addition to its original jurisdication of this case, plaintiffs' motion is hereby granted as prayed. It is ORDERED AND ADJUDGED that the interpleader bond with surety posted by defendant is void ab initio, nullifying the jurisdiction assumed in the interpleader action by the U.S. District Court for the District of Arizona.

Rendered, signed and entered this 4th day of April, 1983.

Apr 4 11:00 AM 1983
Galveston County, Texas
By Deputy

By Don B. Morgan
Judge

APPENDIX L

CASE 77-843 DOCKET # 94—FILED 1/24/83

AFFIDAVIT OF ROBERT B. CUMMING

The undersigned, Robert B. Cumming, being duly sworn, hereby deposes and states under his oath the following:

First let me say, on behalf of my clients Robert and Claudia Hatch and myself, we sincerely regret that our filing of the August 5, 1982 Petition in the District Court of Galveston County, Texas suggested any appearance of contempt of the U.S. District Court for the District of Arizona. Because charges of contempt have been made by Reliance to create that appearance, and because the Court has indicated that the questionable areas consist of Cause I of the Petition and Cause II, Counts 2 and 5 we are in the process of drafting and xeroxing an amendment to the Petition which will remove the three claims. Copies of the amended Petition will be submitted to the Court as soon as we are physically able to complete the work and before the scheduled February 7th hearing in this Court. The Amended Petition will be filed in Galveston by mail when it is completed.

But, without being argumentative I would like to present the personal reasons and legal viewpoint that I had for including the questionable claims in the first place; and to show that contempt of this Court was the farthest thing from my mind.

Clause I is the most questionable area, because I had to allege errors by this Court in the garnishment ruling. I would never seek to have a state court overrule a federal court and I did not petition for such reversal, only to have the federal court rulings declared invalid due to the lack of due process. But without alleging errors by the U.S. District Court and the U.S. Court of Appeals the matter would have been moot and the failure of due process points I wished to make would

not have been considered. These points concerned Rule 21 of the Ninth Circuit court of Appeals—which makes me furious—and the overload breakdown of the United States Supreme Court—which makes me sad. When the great minds of the eighteenth century established this supreme edifice of our democracy there were only a few million people in this country. With a population now upwards of 200 million, the great Court needs help if full judicial review is not to be denied to most applicants.

I had intended to ask the Galveston court to certify the points raised in Cause I to the Texas Supreme Court. If this were done and the Texas Supreme Court found Rule 21 arbitrary and capricious, the Ninth Circuit Court of Appeals might eliminate it. No other United States Court of Appeals has a similar local rule to my knowledge. If the fact of inadequate review by the United States Supreme Court was found to be true, Congress would at last be spurred into action. It could even be that the 50-member National Court of Review proposed by many legal scholars could be achieved by legislation granting such final review to the fifty state Supreme Courts already in existence—at least on questions of state law.

I meant no contempt by proposing this admittedly innovative idea for judicial system improvement to meet the needs of our modern times.

The other questionable areas are Counts 2 and 5 of Cause II of the Petition prior to amendment: Although they are also being removed, to show that I had reasonable legal grounds for including them—third party beneficiary and Heritage trustee—trustor relationship—the accompanying Memorandum presents cases and authorities I relied on, thinking first that the injunction ended with the end of the interpleader and that, in any event, the filing of these claims did not violate the interpleader injunction.

There is a misfortune of which you should be made aware. I think that if I had simply been able to resume our cause in

Case No. 114,361A in Galveston—the case that was stayed by federal and county courts until resolution of the interpleader—such a resumption would not have appeared contemptous. Unfortunately, that case was rountinely put on the "drop docket" for lack of prosecution every six months in accordance with local rule. Notice was sent to the parties to respond several times and each time I responded, pointing out that my failure to prosecute the case was due to the interpleader injunction.

Then came a great shock. The latest "drop docket" postcard notice was somehow sent to the address of my Houston law office I had vacated three years before. The U.S. Postal Service will not forward mail after one year, so the notice was returned to the Galveston court—but no one noticed, apparently, though it is now in the file of the case. To avoid any such error I had asked the Clerk of Court to staple an index card with my Camano Island address on the cover of the file, and the card is still there. I had also corresponded from my current address in connection with the other "drop docket" notices. When I learned that the case had been dismissed—from Mr. Haug's statement in your chambers—it was too late under local rules to re-open the case because of accident, mistake or clerical error. No one can explain how the error happened. The Clerk of the Galveston Court was as shocked as Mr. and Mrs. Hatch and I. He has since added my correct address in large writing with black felt pen across the cover of the file.

Judge I. Allen Lerner, in response to my letter, sent me the letter of which a copy is attached hereto. I felt I could not take his advice and refile until the final order in the interpleader proceeding—the denial of my petition for rehearing by the Supreme Court. When I then felt free to refile I had to emphasize garnishment to show it was a continuation of the original case. It would not have suggested contempt if I could simply have amended a pending case to set forth in detail the claims reserved by plaintiffs

when I was trying to get a summary judgment on the issue of garnishment alone.

Before filing the Petition in Galveston to renew the case as Judge Lerner suggested, I met with Mr. and Mrs. Hatch, explained the situation, pointed out the time and expenses that would be involved in resuming our cause in Galveston and advised them that, although our case was no longer as good as when it contained the garnishment claim, it still was worth pursuing if they insisted. By then I was fatigued from all the work, loss of income to my family and uncertainties for so many years. I really wanted to drop the whole thing, but when my clients said they wanted to carry on, I did so out of my duty as a lawyer.

In accordance with your suggestion at the January 11, 1983 hearing, I have attempted to discuss settlement with the attorneys for Reliance. I had in mind a modest amount of recovery—but was not given a chance to mention it. Their non-negotiable settlement proposal was that they would dismiss the contempt charges and similar charges by the Reliance Houston law firm if I would stipulate and dismiss with prejudice the Galveston County action. This would not be fair.

I'm sorry this affidavit is so lengthy but I have felt compelled to tell the Court some of the facts not otherwise in the record. I can't believe that my family and I will be made to suffer a contempt finding for just trying to win for my clients the jury trial that they felt was their right. This is my last law case. To end forty-two years of proven integrity as a lawyer with my first contempt of court show cause Order is bad enough.

Respectfully,
Robert B. Cumming
Subscribed and sworn to before me by Robert B. Cumming on this 21st day of January, 1983.
Notary Public in and for Skagit County,
State of Washington.

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

RELIANCE INSURANCE COMPANY, a corporation	)	
Plaintiff,	)	CIV 77-843-PHX VAC
vs.	)	
RICHARD W. KOEB, as Receiver for Heritage Trust Company; ROBERT C. HATCH and CLAUDIA R. HATCH; and WALTER C. MADSEN, Superintendent of Banks, State of Arizona, Defendants.	)	AFFIDAVIT BY ROBERT B. CUMMING, ATTORNEY FOR DEFENDANTS ROBERT C. & CLAUDIA R. HATCH

TO THE HONORABLE VALDEMAR A. CORDOVA,
JUDGE OF SAID COURT:

The undersigned, Robert B. Cumming, being duly sworn, hereby deposes and respectfully states, as follows:

Be it remembered, on April 25, 1983 at the conclusion of a hearing disposing of plaintiff, Reliance Insurance Company's charges of contempt against defendants Robert and Claudia Hatch and their attorney, Robert B. Cumming, this Honorable Court issued an Order finding that said attorney had been in contempt of court for filing a complaint in the District Court of Galveston County, Texas which contained three counts on claims deemed to have been adjudicated in interpleader proceedings in this Court; further finding that said attorney had purged such contempt by filing an amended petition in said State court, removing said three

counts from the Texas action. Plaintiff's attorney pointed out that the Houston attorneys for Reliance had petitioned to remove the Texas action from the State court to the United States District Court for the Southern District of Texas, Galveston Division. Mr. Cumming reminded the Reliance attorney that a motion for leave of court to file the amended petition was before the federal court in Galveston and that the Houston attorneys for Reliance had filed an opposition to its filing. The Order of this Honorable Court, therefore, was issued with a proviso that Mr. Cumming submit to the Court within thirty days of the April 25, 1983 Order a report under oath regarding the amended complaint. (A copy of the pending motion for leave of court and a copy of the amended petition, which is on file in the State court, are attached hereto as Attachment I.)

This Affidavit is respectfully submitted by mail on May 20, 1983 in accordance with said proviso of April 25, 1983:

1. At the initial hearing, January 11, 1983, on this Show Cause matter the Court indicated three counts that were questionably in contempt and three that appeared viable in the Hatches' Original Petition as plaintiffs in the state court case No. 123,723.

2. Immediately on return to his office in his home on Camano Island, Washington, Mr. Cumming began, completed and, on January 26, 1983, mailed for filing in case No. 123,723 a First Amended Original Petition, removing the three questionable counts. Leave of court under the Texas Rules of Civil Procedure is not required for filing an amendment in Texas State courts, if the amendment is made at least seven days before trial. (A copy of said amended petition was mailed to this United States District Court on January 26, 1983 as shown in the copy of the letter of transmittal to the State court, attached hereto as Attachment II.)

3. On the same day, January 26, 1983, Mr. Cumming mailed to the United States District Court, Galveston

Division, a copy of said First Amended Original Petition for evidentiary purposes. (A copy of transmittal letter is attached hereto as Attachment III.) That mailing was returned by the Clerk of said court with instructions to first obtain leave of court, per local rule, for filing in case No. CIV G-82-358, the disputed removal case.

4. On February 18, 1983 (there were delays in the mail) Mr. Cumming filed a motion for leave of court by letter of transmittal containing copies of the First Amended Original Petition to the Honorable Hugh Gibson, Judge of the United States District Court, Galveston Division. (Copy of letter with motion attached hereto as Attachment IV.)

5. On February 25, 1983 Reliance Insurance Co., the defendant in the State court cast (No. 123,723) and the federal court removal case (No. CIV G-82-358), mailed its Opposition to our Motion for Leave of Court to file the amended original complaint. (Reliance Opposition attached hereto as Attachment V.). That motion and the several Hatch motions to dismiss and remand in case No. CIV G-82-358 had not been set for hearing prior to April 25, 1983, the date of the disposition hearing on the Show Cause charges.

6. On April 4, 1983 the Honorable Don B. Morgan, Judge of the District Court of Galveston County, Texas, ruled that case No. 114,361A, which commenced the Hatch action against Reliance on March 30, 1977 and was removed by interpleader November 21, 1977, should be reinstated due to the termination of the interpleader proceedings, since the case had been dismissed as the result of errors. Mr. Cumming immediately filed a First Amended Original Petition in No. 114,361A to purge that case, too, of the three questionable claims. Also, it was agreed with the new Galveston Counsel for the trustor class (Henry S. Coltzer, Esq.) that the amended petition should be further trimmed to remove irrelevant material concerning garnishment; to specifically spell our viable claims that had been reserved in the original proceedings in that case; to add details as to the

claim of abuse of process; and to add a principal alleged co-conspirator as a defendant in the reinstated state court action. It seemed that case No. 114,361A, which was not available for a diversity petition to remove more than thirty days after its filing on March 30, 1977, would be the case that would proceed toward trial on the issues.

7. On April 18, 1983, on rehearing granted pursuant to a Reliance motion for reconsideration, Judge Morgan reversed the reinstatement of Case No. 114,361A, but confirmed his ruling that Case No. 123,723, filed on instructions from the Honorable I. Allen Lerner, Judge of that Court, was a continuation and supplement to Case No. 114,361A. Mr. Cumming was on the road to and from Phoenix, but as soon as possible after returning home from the April 25, 1983 hearing in Phoenix he prepared a Second Amended Original Petition and mailed it to Mr. Coltzer, trustors' attorney, for filing in both the state and federal courts in Galveston. This Second Amended Petition, now filed in Case No. 123,723 in the State Court, follows the described First Amended Original Petition in Case no. 114,361A. Attachment I. hereto shows that leave of court has also been requested for filing that Second Amendment in the United States District Court, Galveston.

8. On May 12, 1983 a hearing was held before Judge Gibson of the Galveston federal court on a Reliance motion for "change of venue, etc." to the Phoenix federal court. Judge Gibson determined that additional pleadings should be submitted by the parties on the issue of remand of the case to the State court, and deferred consideration of granting leave of court for the filing of the amended petition.

9. In conclusion, Robert B. Cumming has amended the Original Petition of Robert and Claudia Hatch and former trustors of Heritage Trust Company (the class) to eliminate all of the three claims held to be contemptuous. Said amendment is properly filed and before the District Court of Galveston County, Texas. If the removal case is not

remanded to the State court, he will continue to press for leave of court to file the amendment in the United States District Court for the Southern District of Texas, Galveston Division. If the Reliance opposition to such filing again delays or prevents leave of court being granted by Judge Gibson, then Reliance is estopped from raising such delay or prevention as a bar to the disposition Order of April 25, 1983 by this United States District Court for the District of Arizona.

Respectfully submitted,
/s/ Robert B. Cumming
Attorney at Law
383 N. Roberts Way
Camano Island, WA 98292
(206) 387-9603

COUNTY OF ISLAND
STATE OF WASHINGTON

The foregoing Affidavit was subscribed and sworn to before me by the above signed Robert B. Cumming who swears that the facts set forth therein are true and correct and that the documents attached thereto are true copies of original documents as represented.

Notary Public in and for the County of Island, State of Washington.

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

RELIANCE INSURANCE CO.,	)	
PLAINTIFF,	)	No. CIV 77-843 PHX VAC
vs.	)	RESPONSE TO SUPPLEMENTAL
ROBERT C. HATCH & CLAUDIA R. HATCH, et al.	)	MEMORANDUM AND AFFIDAVIT
Defendants.	)	

This Response is in reply to plaintiff's Supplemental Memorandum dated June 9, 1983, attaching Affidavit by David E. Warden, dated June 2, 1983:

1. The attachments referred to on page 1. of Mr. Cunningham's Memorandum were not intended to "explain" matters; they simply corroborated statements in Mr. Cumming's affidavit. The attachments were mailed to Mr. Cunningham on June 6, 1983 after receiving Mr. Cunningham's February 10, 1983 pleadings late in May, 1983.

2. Mr. Cunningham ignores the admission in Mr. Warden's affidavit that the first Amendment to Case No. 123,723–the number in Galveston—was filed in Case No. 123,723 in the Galveston State Court; and Motion for Leave to File that Amendment in the Federal Court was opposed by Reliance and has yet been ruled on by Judge Gibson of that Court. The first Amendment eliminated the Counts considered questionable and later ruled to be contemptuously by Judge Cordova in this Show Cause proceeding.

3. Every action, document, filing or attempted filing by

Mr. Cumming after Judge Cordova's advice from the bench on January 11, 1983, has been aimed at eliminating the three questionable Counts from the Original Petition filed by Mr. Cumming in August, 1982 in the Galveston State Court.

4. The elimination of the three Counts is the only matter relevant to the Show Cause charges by Reliance against Mr. Cumming in this Court. (I am compelled to point out that Mr. Warden's statement in his affidavit that Mr. and Mrs. Hatch were found in contempt is not true. Plaintiffs did not show any wilful misconduct by the Hatches justifying such a finding, and the stenographic record will show that, properly, no such finding was made.)

5. Let us now consider the Second Amendment [illegible] No. 123,723. This amendment also eliminates the three Counts.

6. The Second Amendment was personally hand delivered and filed by Mr. Cumming on April 6, 1983 in the Galveston State Court in Case No. 114,361A (it was enumerated Amendment No. 1 in that case—the original number of the case against Reliance, which had been removed by interpleader, dismissed, then reinstated by Order of the State Court on April 4, 1983.) Mr. Cumming then carried copies across the street from the County Courthouse and gave them to attorney Henry S. Coltzer who had agreed to serve as local counsel for the trustors. Mr. Coltzer promised to serve copies on Reliance and, with citation, on defendant John R. Bromley when his Texas address was found, otherwise by publication. Mr. Coltzer failed to do this prior to April 18, 1983, when No. 114,361A was de-instated in the State Court, its file consolidated with supplemental Case No. 123,723.

7. On returning home from the Show Cause disposition hearing on April 25, 1983 in Phoenix, Mr. Cumming copied the Amendment he had filed in No. 114,361A, with minor changes in the direction of precision (eliminating the three

Counts); and mailed it to Mr. Coltzer for filing in the State and Federal Courts (No. 123,723—the supplemental case in the State Court and No. G-82-358—the removal case in the Federal Court). Mr. Coltzer advised Mr. Cumming on the phone that he had filed the Amendment in No. 123,723 on May 13, 1983 in the State Court, but that Judge Gibson had deferred ruling on its filing in the Federal Court. Mr. Warden in his affidavit at lea admits that Mr. Coltzer showed a copy of said Amendment at the May 12, 1983 hearing before Judge Gibson. Mr. Cumming signed the Motion for Leave to File, but out of professional courtesy he had provided for its signing and service on defendants by local counsel, Mr. Coltzer. I don't understand why Mr. Warden did not consult with Mr. Coltzer on the matter. As late as yesterday, June 17, 1983, Mr. Coltzer insists that he filed the Amendment in the Federal Court, but cannot give Mr. Cumming the date of said filing. He now says that Judge Gibson's displeasure prevented his filing the Amendment in the State Court and now admits he did not file it in the State Court.

8. I no longer believe Mr. Coltzer, so I have, June 17, 1983, mailed a second amendment for filing in the State Court and with motion for leave to file in the Federal Court. This Amendment, of course, also eliminates the three Counts, and I am pleased that Mr. Warden's affidavit implies no opposition by Reliance or the Federal Court.

9. Mr. Coltzer has been requested by Mr. Hatch and Mr. Cumming to withdraw from his position as local counsel. He has agreed by phone to withdraw and to turn over his files on the matter to Mr. Hatch at 9:00 A.M. this morning, Saturday, June 18, 1983 (When a notary public is available on a week day I will send an affidavit as to the truth of this response, if necessary). If anything in his file sheds light on Mr. Coltzer's behavior since his employment on April 4, 1983, I shall inform the Court, if the Court so desires.

10. Mr. Coltzer has never written to me or to the Hatches

in answer to our questions. He returned one call out of perhaps a dozen calls on the phone from me in my efforts to find out the status of the matter in Galveston. He has sent no copies of any pleading he may have filed on his own, although he stated that he had filed a pleading on the defective removal and the dismissal-or-remand question before Judge Gibson. (Fortunately, I have directly mailed pleadings on that question to the Court.)

11. I do not understand the ethical derelictions on the part of many members of the legal profession. Mr. Coltzer's behavior is almost identical to that of our first local counsel chosen to represent the Hatches in Phoenix (not Mr. Peskind). From April, 1976 to November, 1976, that attorney reported to the Hatches and me that he had made filings, services of executions on defendants, applications for supersedeas bond postings by the Receiver for Heritage, court hearings, etc.—none of which duties were ever performed. He ignored my requests for information on the Reliance insurance bond, a copy of which was in the Maricopa County Court files in the case of the Heritage Receiver against Reliance. Finally, I asked the Arizona State Bar Association Disciplinary Board to investigate. Over an investigatory period of four years the appointed bar counsel in the proceedings found what he called the "smoking gun" to expose cover-up, in the attorney's file records. I was not vindictive and did not press for damages; and I could not spend my clients' hard earned money to attend the disciplinary hearing in Phoenix, so the case was dismissed. Throughout the last year or two of the investigation and at the final hearing, the malpracticing attorney was represented by Jennings, Strauss & Salmon, attorneys for Reliance. Among his clients in Martindale-Hubbell the miscreant listed United/Reliance Insurance Company.

12. At this point I intend that no inference be drawn from the described breach of canons of the profession in the Phoenix case, as applied to what seems to be professional

misconduct by Mr. Coltzer. I simply don't know his motivation. Perhaps by sworn affidavit he can refute the facts given by Mr. Warden in his affidavit. Until then I regretfully look forward to trying to travel to Galveston on a series of short-notice hearings in the Galveston Courts until we find another local counsel. Unfortunately Mr. Hatch is not equipped to proceed per se.

On June 18, 1983,
Respectfully submitted,
Robert B. Cumming

APPENDIX O

NO. 123,723

ROBERT C. HATCH AND CLAUDIA R. HATCH; AND TRUSTORS OF HERITAGE TRUST COMPANY,	)	IN THE DISTRICT COURT OF GALVESTON COUNTY, TEXAS
Plaintiffs,	)	
VS.	)	212TH JUDICIAL DISTRICT
RELIANCE INSURANCE COMPANY,	)	
Defendant.	)	

NOTICE OF FILING OF PETITION FOR REMOVAL

TO THE HONORABLE JUDGE AND CLERK OF SAID COURT:

On September 7, 1982, Reliance Insurance Company, Defendant herein, filed a petition to remove this case to the United States District Court for the Southern District of Texas, Galveston Division. At this time, a removal bond was also filed. Copies of these instruments are attached hereto.

Please file this notice, the petition for removal and the bond for removal with the papers of this case.

Respectfully submitted,
BAKER & BOTTS
By David Edward Warden
State Bar No. 20856750
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1234
Attorney for Defendant
Reliance Insurance Company

CERTIFICATE OF SERVICE

I, David Edward Warden, certify that a true and correct copy of the foregoing has been sent to Robert B. Cumming, 383 N. Roberts Way, Camano Island, Washington 98292, by placing same in the United States mail, certified, return receipt requested, on this the 7th day of September, 1982.

David E. Warden

A true copy I certify under my hand and seal of office.
V.J. Beninati, Jr. Clerk District Court, Galveston County, Texas
By Rose Mary Little, Deputy

'82 SEP 10 A11:27
GALVESTON COUNTY, TEXAS
By Deputy

MICROFICHED—F

APPENDIX P

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ROBERT C. HATCH AND CLAUDIA R. HATCH; AND TRUSTORS OF HERITAGE TRUST COMPANY,	)	FILED 3/1/83 DOCKET 14)
Plaintiffs,	)	C.A. NO. G-82-358
VS.	)	
RELIANCE INSURANCE COMPANY,	)	
Defendant.	)	

FIRST AMENDED PETITION FOR REMOVAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Reliance Insurance Company, defendant herein, and respectfully prays that this case be removed to the United States District Court for the Southern District of Texas, Galveston Division, and in support thereof would show the Court as follows:

1. Petitioner, Reliance Insurance Company is the defendant herein.

2. On August 5, 1982 this suit was commenced against petitioner in the District Court of Galveston County, Texas, 212th Judicial District, as Cause No. 123,723.

3. On August 11, 1982, petitioner was served with Citation and Plaintiff's Original Petition.

4. On September 7, 1982, petitioner filed its original Petition for Removal in the United States District Court for

the Southern District of Texas, where the case is now pending as Cause No. G-82-358.

5. The amount in controversy herein, exclusive of interest and costs, exceeds $10,000.00.

6. Plaintiffs Robert C. Hatch and Claudia R. Hatch are citizens and residents of Galveston County, Texas.

7. Reliance Insurance Company is a corporation organized under the laws of the State of Pennsylvania and has its principal place of business in Philadelphia, Pennsylvania. Consequently, Reliance Insurance Company is a citizen of Pennsylvania for purposes of diversity jurisdiction at this time, and was a citizen of Pennsylvania at the time of the commencement of this lawsuit and at the time of filing the petition for removal.

8. This action is a civil action in which the plaintiffs allege negligence and breach of contract.

9. This Court has original jurisidiction over the above-entitled action by virtue of diversity of citizenship, 28 U.S.C. §1332(a)(1), and may be removed to this Court pursuant to 28 U.S.C. §1441.

10. Pursuant to 28 U.S.C. §1446(d), petitioner presented and filed with its original Petition for Removal a bond with good and sufficient surety conditioned that petitioner will pay all costs and disbursements incurred by reason of the removal proceedings herein sought should it be determined that this action is not removable or that it was improperly removed.

11. Copies of the Citation and Plaintiffs' Original Petition in this action were attached to the original Petition for Removal and are a part of the record of this case.

12. Petitioner's original Petition for Removal was timely filed. This Amended Petition for Removal is filed with this Court pursuant to 28 U.S.C. §1653, after obtaining leave of court pursuant to a motion to amend the original Petition for Removal.

WHEREFORE, PREMISES CONSIDERED, Reliance Insurance Company, respectfully prays that this action be removed from the District Court of Galveston County, Texas, 212th Judicial District to this Court.

Respectfully submitted,
David Edward Warden
Attorney-in-Charge for
Reliance Insurance Company

OF COUNSEL:
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas, 77002
(713) 229-1234

STATE OF TEXAS

COUNTY OF HARRIS

BEFORE ME, the undersigned authority, personally appeared David Edward Warden, who upon oath, stated that he is the attorney of record for Reliance Insurance Company, petitioners herein; that he has prepared and read the foregoing Petition for Removal and that the matters set forth and contained therein are true and correct.

David Edward Warden

SUBSCRIBED AND SWORN TO before me on this the 25th day of February, 1983.

Notary Public in and for State of Texas

JURY DEMAND

Defendants hereby demand their right to trial by jury. A jury was not demanded prior to removal, because no pleading was filed in state court.

David Edward Warden

CERTIFICATE OF SERVICE

I, David Edward Warden, certify that a true and correct copy of the foregoing First Amended Petition for Removal has been sent to Robert B. Cumming, 383 N. Roberts Way, Camano Island, Washington 98292, and to Robert B. Cumming, c/o Robert C. Hatch, 111 Mary Ann Drive, Friendswood, Texas 77546, by placing the same in the United States Mail, certified, return receipt requested this the 25th day of February, 1983.

David Edward Warden

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ROBERT C.HATCH AND CLAUDIA R. HATCH; AND TRUSTORS OF HERITAGE TRUST COMPANY,	)	
Plaintiffs,	)	C.A. NO. G-82-358
VS.	)	
RELIANCE INSURANCE COMPANY,	)	
Defendant.	)	

SECOND AMENDED PETITION FOR REMOVAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Reliance Insurance Company, defendant herein, and respectfully prays that this case be removed to the United States District Court for the Southern District of Texas, Galveston Division, and in support thereof would show the Court as follows:

1. Petitioner, Reliance Insurance Company is the defendant herein.

2. On August 5, 1982 this suit was commenced against petitioner in the District Court of Galveston County, Texas, 212th Judicial District, as Cause No. 123,723.

3. On August 11, 1982, petitioner was served with Citation and Plaintiff's Original Petition.

4. On September 7, 1982, petitioner filed its original Petition for Removal in the United States District Court for

the Southern District of Texas, where the case is now pending as Cause No. G-82-358.

5. The amount in controversy herein, exclusive of interest and costs, exceeds $10,000.00.

6. Plaintiffs Robert C. Hatch and Claudia R. Hatch are citizens and residents of Galveston County, Texas.

7. Reliance Insurance Company is a corporation organized under the laws of the State of Pennsylvania and has its principal place of business in Philadelphia, Pennsylvania. Reliance Insurance Company has been a corporation organized under the laws of the State of Pennsylvania and has had its principal place of business in Philadelphia, Pennsylvania at all times relevant to the issue of proper removal, including at the time this lawsuit was filed and at the time the original petition for removal was filed.Consequently, Reliance Insurance Company is a citizen of Pennsylvania for purposes of diversity jurisdiction at this time, and was a citizen of Pennsylvania at the time of the commencement of this lawsuit and at the time of filing the petition for removal.

8. This action is a civil action in which the plaintiffs allege negligence and breach of contract.

9. This Court has original jurisdiction over the above-entitled action by virtue of diversity of citizenship, 28 U.S.C. §1332(a)(1), and may be removed to this Court pursuant to 28 U.S.C. §1441.

10. Pursuant to 28 U.S.C. § 2446(d), petitioner presented and filed with its original Petition for Removal a bond with good and sufficient surety conditioned that petitioner will pay all costs and disbursements incurred by reason of the removal proceedings herein sought should it be determined that this action is not removable or that it was improperly removed.

11. Copies of the Citation and Plaintiffs' Original Petition in this action were attached to the original Petition for Removal and are a part of the record of this case.

12. Petitioner's original Petition for Removal was timely filed. This Amended Petition for Removal is filed with this Court pursuant to 28 U.S.C. § 1653, after obtaining leave of court pursuant to a motion to amend the original Petition for Removal.

WHEREFORE, PREMISES CONSIDERED, Reliance Insurance Company, respectfully prays that this action be removed from the District Court of Galveston County, Texas, 212th Judicial District to this Court.

Respectfully submitted,
David Edward Warden
Attorney-in-Charge for
Reliance Insurance Company

OF COUNSEL:
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1234

STATE OF TEXAS
COUNTY OF HARRIS

BEFORE ME, the undersigned authority, personally appeared David Edward Warden, who upon oath, stated that he is the attorney of record for Reliance Insurance Company, petitioners herein; that he has prepared and read the foregoing Petition for Removal and that the matters set forth and contained therein are true and correct.

David Edward Warren

SUBSCRIBED AND SWORN TO before me on this the 18th day of May, 1983.

Notary Public in and for
State of Texas

JURY DEMAND

Defendants hereby demand their right to trial by jury. A jury was not demanded prior to removal, because no pleading was filed in state court.

David Edward Warden

CERTIFICATE OF SERVICE

I, David Edward Warden, certify that a true and correct copy of the foregoing Second Amended Petition for Removal has been sent to Robert B. Cumming, 383 N. Roberts Way, Camano Island, Washington 98292, and to Henry Coltzer, 710 19th Street, Galveston, Texas 77550, by placing the same in the United States Mail, certified, return receipt requested this the 18th day of May, 1983.

David Edward Warden

APPENDIX R

FILED AUGUST 7, 1982
NO. 123,723

STATE OF TEXAS
COUNTY OF GALVESTON

ROBERT C. HATCH and CLAUDIA R. HATCH; and	)	ORIGINAL PETITION IN THE
TRUSTORS OF HERITAGE TRUST COMPANY,	)	DISTRICT COURT OF GALVESTON COUNTY, TEXAS
Plaintiffs,	)	212th JUDICIAL DISTRICT
vs.	)	
RELIANCE INSURANCE COMPANY, a Pennsylvania Corporation,	)	
Defendant.	)	

PLAINTIFFS' ORIGINAL PETITION

NOW COME Robert C. Hatch and Claudia R. Hatch on their own behalf and on behalf of former trustors of Heritage Trust Company, hereinafter called "Plaintiffs," and file this, their Original Petition, complaining of and against Reliance Insurance Company, hereinafter called "Reliance" and "Defendant"; and for cause of action would respectfully show unto the Court as follows:

1. Plaintiffs Robert and Claudia Hatch are citizens of the State of Texas and residents of Friendswood, Galveston County, Texas; Plaintiffs Trustors are other citizens of

Texas and other States who, like the Hatches, invested in so-called "Revocable Intervivos Trusts" sold by Heritage Trust Company, hereinafter called "Heritage," an Arizona corporation now in receivership by order of the Superior Court of Maricopa County, Arizona.

2. Defendant, Reliance Insurance Company, is a foreign corporation authorized to do business and doing business in the State of Texas, with registered agent and address for service: Jerome J. Kwilosz, Registered Agent-Reliance Insurance Co., 200 Insurance Plaza Building, 411 N. Akard; Dallas, Texas 75202.

BACKGROUND

3. On March 5, 1976, after proper service of process on the Secretary of State of Texas as statutory agent for Heritage Trust Co., an Arizona corporation, and other out-of-state defendants; and after failure of any defendant to appear or answer, the Honorable Donald Markle, Judge of the 56th Judicial District of the District Court of Galveston County, Texas, giving full consideration to the statutes, rules and judicial decisions of Texas and careful review of the evidence presented by Plaintiffs Hatch in open court, entered a default judgment in favor of Plaintiffs against the defendants, finding conspiracy to defraud and violations of statutes constituting thirteen felonies by Heritage, its president, John H. Bromley, secretary, Bertha Bromley, other specified Heritage employees and other co-conspirators (Case No. 114,361).

4. Said judgment for actual and exemplary damages in the sum of $129,972.22 is a valid and final judgment and remains unsatisfied. On April 1, 1976 it was registered as a foreign judgment in Arizona.

5. On April [illegible], 1976, the Superintendent of Banks for the State of Arizona was appointed Receiver for Heritage by the Superior Court of Maricopa County, which also issued an injunction against the Hatches and all other trustors of

Heritage preventing any enforcement proceedings against Heritage—in Arizona.

6. On or about March 30, 1977—in Texas—Robert and Claudia Hatch caused to be served a Writ of Garnishment on Reliance Insurance Company, a debtor of Heritage. Reliance traversed the allegations of Plaintiffs, denied it was indebted to Heritage and denied it was in any way indebted to Plaintiffs, thus placing in issue the question of the liability of Reliance to third party trustors, to be litigated in Case No. 114,361-A. Litigation of this question was reserved in pleadings by Plaintiffs, pending adjudication of the garnishment claim. The controverted questions of the garnishment suit may be briefly defined as:

a) Did service of garnishment on Reliance make it unlawful for Reliance as garnishee to pay Heritage any debt or deliver to Heritage any effects until satisfaction of the Hatch judgment against Heritage, the principal debtor? (The garnishment claim—an issue of law).

b) Is Reliance indebted to the Hatches and all trustors who suffered indemnifiable losses from acts of fraud or dishonesty committed by employees of Heritage as covered under the terms and as a result of the issuance and continuance of the indemnity bond insurance bond polciy sold to Heritage by Reliance (attached as Exhibit A hereof), which in an era notorious for fraud and dishonesty in the sale of Arizona real estate was issued by Reliance as a reassuring safeguard ostensibly protecting trustors induced to entrust their savings to Heritage. The Bond was widely advertised and promoted as being such a safeguard. Reliance had full knowledge of the nature of Heritage's public solicitation and had or reasonably should have had knowledge of past security violations and shady practics by the land fraud conspirators, including the principal officers of Heritage. (The third party claim—issues of law and fact).

7. The Commercial Blanket Bond containing the insurance agreement between the parties provides that Reliance

will pay for any loss from any fraudulent or dishonest act by any Heritage employee. The limit of liability for any such loss is one million dollars. The sum of all such losses, as estimated by the Heritage Receiver, is seven million dollars. The acts of employees which caused losses to Heritage are admitted by Reliance to have commenced at least as early as April 27, 1983. The period of the bonded insurance agreement was from December 15, 1972 to August 15, 1974, when it was cancelled by Reliance due to an S.E.C. suit for fraud vs. Heritage.

8. The garnishment suit—#114,361-A—was set by the Honorable Don Morgan, presiding Judge, to begin with trial by jury in the District Court of Galveston County on November 21, 1977. In pretrial proceedings, Judge Goddard had ruled that garnishment had impounded any debt owed to Heritage by Reliance, but that the factual issues of such liability must first be determined at trial before ordering payment to Plaintiffs.

9. This Original Petition by Plaintiffs sets forth two causes of action on grounds stemming from the two seminal issues recited in paragraphs 6.a) and b) above.

10. We will show the Court that this Original Petition represents a continuance of Cases #114,361 (final judgment of March 5, 1976) and #114,361-A (enforcement of final judgment by Writ of Garnishment served March 30, 1977). On the day set to begin trial in Galveston, the res was removed to the federal courts by an action in interpleader filed by Reliance. By Order of the United States District for the District of Arizona Plaintiffs were enjoined from proceeding to prove up their claims in any other state or federal court. On that day also, November 21, 1977, in the interest of federal-state comity, Judge Gibson ordered a Stay of the Galveston proceedings until the matter was resolved in the federal courts.

11. Plaintiffs moved for a declaratory judgment in the U.S. District Court on the effect of the Texas Writ of

Garnishment. The motion was denied by Judge Valdemar Cordova; the denial was affirmed by the United States Court of Appeals for the Ninth Circuit; and judicial review of the lower court decisions was refused by the United States Supreme Court which denied Plaintiffs Petition for Certiorari and Petition for Rehearing. The final ruling—the denial of the Petition for Rehearing—was entered on June 6, 1982, constituting the final resolution of the federal proceedings.

12. Following the Memorandum Opinion by the U.S. Court of Appeals, on motion by Reliance, Judge Cordova of the U.S. District Court, with no finding of prejudice on issues other than the effect of garnishment, dismissed the Hatches from the U.S. District Court interpleader case. Almost immediately thereafter, Reliance admitted its liability to Heritage and settled with Heritage by payment of a nominal sum, which, to the best of our knowledge, has been used by the Receiver for expenses and accrued legal fees. The ensuing dismissal of the interpleader case by Judge Cordova was with prejudice, but affected only the remaining parties in the interpleader action: Reliance and the Receiver for Heritage, acting for the corporate receivership defendant and its stockholders (but not for the trustors). Once again Reliance had successfully avoided a jury trial which Judge Cordova had set for March 30, 1982.

13. Copies of pleadings and proceedings in the U.S. District Court for Arizona and the U.S. Court of Appeals for the Ninth Circuit are available on request from this Court. To avoid repetition we are only submitting herewith copies of: 1) Opinion and Order of the U.S. District Court (Exhibit B); 2) Amendment of U.S. District Court Opinion and Order (Exhibit C); 3) Memorandum Opinion of the U.S. Court of Appeals (Exhibit D); 4) Plaintiffs' Petition for Certiorari to the U.S. Supreme Court (Exhibit E); 5) Plaintiffs' Petition for Rehearing to the U.S. Supreme Court (Exhibit F); and 6) U.S. District Court dismissal of Robert and Claudia Hatch

from the federal interpleader action (Exhibit G).

14. The enumerated exhibits are attached hereto and incorporated by this reference as a part of this Original Petition.

CAUSE I.

15. The allegations of paragraphs 1. to 14. above are realleged and incorporated herein by this reference.

16. Articles 4076 and 4084 of Vernon's Annotated Texas Statutes, and Rule 657 of the Texas Rules of Civil Procedure, with judicial decisions appertaining thereto, clearly give to Plaintiffs, Robert and Claudia Hatch, the right to impound by service of their Writ of Garnishment funds or other property owed by Reliance to Heritage. The Receiver for Heritage "stands in the shoes" of Heritage, the receivership defendant and has the same rights and obligations which Heritage had as of April 16, 1976, the date the Receiver was appointed.

17. In federal interpleader actions the federal courts must honor and follow the laws of the state from which a defending party was removed. An Arizona receiver has no jurisdiction over a res subject to the prior jurisdiction of the state of Texas.

18. The described interpleader proceedings and Orders by the federal courts are invalid and must be considered null and void and of no force or effect, on the following grounds:

19. First, the only question of law held by the federal courts to be litigated in the interpleader action was that of Plaintiffs' claim in garnishment. Yet the Texas law of garnishment was never reviewed, mentioned nor applied by the federal courts, despite the ruling of Judge Goddard of the Galveston County District Court granting the garnishment claim of Plaintiffs, subject to proving the liability of Reliance, as garnishee, to Heritage, the judgment debtor of Plaintiffs.

20. Second, the jurisdiction of the Superior Court of

Maricopa County, Arizona was extended by the federal courts to include property and persons over which the District Court of Galveston County, Texas had achieved prior jurisdiction on December 16, 1975, the date of filing by Plaintiffs Hatch of their suit against Heritage, resulting in the final judgment of March 5, 1976 and the continuing enforcement of such judgment by Writ of Garnishment served on March 30, 1977.

21. Third, the denial of Texas jurisdiction and Plaintiffs' rights thereunder was based on gross errors of law by the U.S. District Court for Arizona, as set forth in detail in Plaintiffs' Petition for Certiorari (Exhibit E. hereof).

22. Fourth, the gross errors of the U.S. District Court were compounded by the U.S. Court of Appeals for the Ninth Circuit in affirming the U.S. District Court's Opinion and Order, and applying the Ninth CCA's local Rule 21 (attached hereto as Exhibit H). Rule 21 purports to call that Court's Memorandum Opinion res judicata on the garnishment claim, but not stare decisis, nor law of the land. Rule 21. prohibits publication or citing of the Opinion as precedent in any other case.

23. If cited as law, the Memorandum Opinion would reverse Ninth CCA and U.S. Supreme Court decisions on garnishment and extraterritorial powers of a state-appointed receiver, dating from the nineteenth century to recent years. Such a publishable opinion, though a startling reversal of precedent and a contradiction of Texas law, might be considered res judicata and a bar to further—proper—adjudication. But this Honorable Court cannot allow the U.S. Court of Appeals to have it both ways: The Ninth CCA cannot issue a covert, ad hominem decision, deny that it is the law of the land, rule that it is the law of the case only, and hold that the matter is now res judicata, thus preventing the Texas Court from its rightful enforcement of its final judgment. In fairness to citizens of Texas, entitled to the due process remedies of their home state courts, this

Honorable Court—though its action may be unprecedented—must courageously exercise its love of justice and the Constitutions of the United States and the State of Texas and declare invalid the Ninth CCA's Rule 21. which wrongfully attempts to terminate Plaintiffs' garnishment claims as res judicata.

24. Fifth, in refusing to review the Ninth CCA Opinion, the U.S. Supreme Court, weakened by its overburdened docket of cases, may have ducked the issue since the Opinion was declared to be not stare decisis, would not reverse published precedents and would only deprive of their rights two little-known citizens of Friendswood, Texas. But, for whatever reason, by accepting for review only 200 out of 5000 cases annually, the U.S. Supreme Court denies full judicial review promised by the U.S. Constitution and denies due process under the Fourteenth Amendment. The only available remedy for such injustice on the federal level is for the courts of the sovereign states of the union to reassert jurisdiction and grant review of legal issues.

25. Sixth, we believe that Judge Gibson of the District Court of Galveston County would not have granted a Stay of that Court's garnishment action in the interest of federal-state comity if he had not been deceived by misrepresentations made by Reliance to secure federal jurisdiction by the interpleader action. Such misrepresentations invalidate the federal proceedings. They constitute fraudulent abuse of process, including the filing of the interpleader, service and injunction of Plaintiffs, and posting of a misrepresented million dollar "surety bond." rather than a valid surety bond as required by the federal interpleader statute.

26. WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray and respectfully demand:

1. that Defendant be cited to appear and answer herein;

2. that the Opinion and Order of the United States District Court for the District of Arizona and the Memoran-

dum Opinion of the United States Court of Appeals for the Ninth Circuit be declared invalid, null and void and of no force or effect as to the effect of Plaintiffs' Writ of Garnishment in Texas;

3. that this Original Petition be accepted as a resumption of jurisdiction by the District Court of Galveston County, Texas:

4. that having reassumed jurisdiction this Action be heard as a continuation of Cases 114,361 and 114,361-A as of November 21, 1977, the date this Court was deceived into granting jurisdiction in interpleader to the federal courts;

5. that, upon hearing, since Reliance ha now admitted liability to Heritage—the only issue which remained to be tried in Case 114,361-A—judgment be rendered for Plaintiffs as prayed in that case.

CAUSE II.

27. The allegations of paragraphs 1. to 26. above are realleged and incorporated herein by this reference.

28. By this Original Petition Plaintiffs, Robert and Claudia Hatch, on their own behalf and as representatives of all Heritage trustors, are seeking to be allowed their right to a trial by jury—twice circumvented by the maneuvers of Reliance—on Plaintiffs' factual allegations showing that Reliance Insurance Company is liable, in contract and tort, to the Hatches and other defrauded trustors of Heritage Trust Company. The federal courts have ruled that such cause of action was not a claim to be adjudicated in the federal interpleader action (Exhibits D. and G. hereof). There are several alternative and supplemental counts to this cause of action:

29. Count (1): Reliance has abused process by fraudulently using legal proceedings to injure the Plaintiffs and by concealing the real purposes contrary to the expressed purposes of such proceedings, including the filing and service on Plaintiffs of its action in the nature of inter-

pleader; its motion for a federal court-ordered injunction enjoining Plaintiffs from proceeding in any other state or federal court; its misrepresentation in posting an invalid Interpleader surety Bond to persuade the federal court to preempt jurisdiction from Texas and other state courts; by maliciously "playing the courts" in an effort to exhaust the resources of Plaintiffs as they attempted to gain their day in court, including an ex parte hearing in San Diego by Judge Wallace of the 9th CCA who "Stayed" the dissolution of his own injunction by Judge Craig of the U.S. District Court for Arizona. (Reliance knew that Plaintiffs could not go to San Diego to oppose the Arizona attorneys for Reliance, since Plaintiffs had to oppose the Houston attorneys for Reliance at the Galveston trail which was set for that same day, November 21, 1977).

30. By reason of the foregoing, Reliance has twice deprived Plaintiffs of their constitutional right to a trial by jury on the facts of Reliance's liability and has caused grievous financial and emotional injury to Plaintiffs.

31. Count (2): Plaintiffs will show that the intention of the parties to the bonded insurance agreement (Exhibit A. hereof) between Heritage and Reliance was to insure Heritage trustors against loss of their money due to fraud or dishonesty by Heritage employees. Contrary to the intention of the parties to the insurance agreement Reliance has denied liability to Plaintiffs as third party beneficiaries of said agreement and has wilfully and in bad faith refused payment of its legitimate insurance obligations in accordance with the express and implied terms of said agreement.

32. By reason of the foregoing Reliance has caused grevious financial and emotional injury to Plaintiffs.

33. Count (3): By selling the indemnity bond to Heritage, insuring the trust company and its beneficiary trustors against any loss from any act of fraud or dishonesty by any employee of Heritage, with a limit of liability of one million dollars for any such loss, Reliance either negligently or

knowingly participated in the conspiracy to defraud concocted and carried out by the Bromleys and other employees and co-conspirators. The Reliance insurance Bond enabled the conspirators to persuade the Hatches and other trustors to entrust their savings to the Heritage trustee, resulting in losses of such savings amounting to the sum, as estimated by the Heritage Receiver, of seven million dollars.

34. By reason of the foregoing, Reliance caused grievous financial and emotional injury to Plaintiffs.

35. Count (4): Reliance negligently issued the Bond to Heritage without regard to its persuasive effect in solicitations of money from the general public; and carelessly neglected or ignored past derelictions in the record of the principal employee/promoters of the "revocable trust" fraudulent schemes. Furthermore, Reliance negligently continued and maintained the Bond after the Bromleys had acquired ownership of Heritage, despite knowledge by Reliance and its agents of the uses and purposes for which Heritage purchased the Bond and knowledge of representations made by employees of Heritage to prospective investors and trustors. Reliance did not deny and took no action with respect to Heritage representations concerning the protection ostensibly given by the Bond to prospective investors and trustors.

36. In so issuing and maintaining the bonded insurance agreement, Reliance fell far below the standard of reasonable care expected of a public insurance company. By gross negligence Reliance breached its duties to those persons it knew or reasonably should have known would be relying on the bonded insurance agreement for their ultimate protection against fraud or dishonesty in the solicitation and use of the investments they entrusted to Heritage as trustee.

37. By reason of the foregoing, Reliance caused grievous financial and emotional injury to Plaintiffs.

38. Count (5): When it entered into the bonded insurance

agreement and when it continued the 3-year Bond by accepting annual premiums therefor, Reliance had knowledge of the modus operandi of Heritage including the fact that all money managed by Heritage, as trustee, derived from funds invested by trustors, including the premiums paid by Heritage to Reliance. By virtue of such knowledge Reliance knew or reasonably should have known that Heritage was a mere trustee/agent for trustors, that the trustors were the real principal party to the insurance agreement and the owners of the Bond. Yet Reliance wrongfully refused to recognize any interest owned by trustors in the Bond, and settled, or purported to settle its obligations by payment of a nominal sum to the Receiver representing Heritage, the receivership defendant, and Heritage stockholders, the Bromleys, in an unlawful effort to evade an estimated seven million dollars rightfully owed to Plaintiffs, the defrauded trustors.

39. By reason of the foregoing, Reliance caused grievous financial and emotional hardship to Plaintiffs.

40. WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray and respectfully demand:

1. that Defendant be cited to appear and answer herein;

2. that upon hearing hereof Plaintiffs have and recover judgment against Defendant for

(a) losses represented by the Hatches' final judgment against Heritage in Case 114,361, other judgments by trustors against Heritage, and other losses by Heritage or trustors provable by the Heritage Receiver or by individual trustors—the total estimated amount of such losses being the sum of seven million dollars;

(b) other actual compensatory and special damages;

(c) costs expended and incurred herein;

(d) exemplary damages for fraud, malice, misrepresentations and negligence by Reliance;

(e) reasonable attorneys fees for services by Plaintiffs'

attorneys from March 30, 1977 to date of payment by Reliance;

(f) interest on the total amount of judgment herein, dating from the date of March 30, 1977—the commencement of this cause of action against Reliance—to the date of payment by Reliance, at the legal rates prevailing during the intervening years; and

(g) such other and further relief, special and general, at law and equity, to which Plaintiffs may be justly entitled.

Dated this 5th day of August, 1982.

CERTIFICATION OF TRUE COPIES

The undersigned, Robert B. Cumming, being duly sworn, hereby deposes and states that the documents marked EXHIBITS A. thru H., attached to Plaintiffs' Original Petition filed in 1982 in the case of Hatch v. Reliance in the District Court of Galveston County, Texas are true and correct copies of the original documents, viz:

EXHIBIT A.:Commercial Blanket Bond with Insurance Agreement between Reliance Insurance Co. and Heritage Trust Company

EXHIBIT B.:Opinion and Order by Judge Valdemar Cordova of the U.S District Court for the District of Arizona

EXHIBIT C.:Amendment of said Order by Judge Cordova

EXHIBIT D.:Memorandum Opinion by the U.S. Court of Appeals for the Ninth Circuit

EXHIBIT E.:Plaintiffs' Petition for Certiorari to the U.S. Supreme Court

EXHIBIT F.:Plaintiffs' Petition for Rehearing to the U.S. Supreme Court

EXHIBIT G.:Judgment of Dismissal by Judge Cordova, U.S. District Court for District of Arizona

EXHIBIT H.:Published copy of local Rule 21. of the U.S. Court of Appeals for the Ninth Circuit.

(signed) Robert B. Cumming
Attorney at Law
383 N. Roberts Way
Camano Island, WA 98292

Subscribed and sworn to before me, a notary public in and for Island County, State of Washington, on the 16th day of July, 1982.

Manette Skeels

My commission expires 5-85.

APPENDIX S

FILED '83 JAN 31 A10:35
GALVESTON
BY DEBORAH RAMSEY, DEPUTY

STATE OF TEXAS
COUNTY OF GALVESTON

ROBERT C. HATCH and CLAUDIA R. HATCH; and TRUSTORS OF HERITAGE TRUST COMPANY,	)	No. 123,723 (Supplemental to 114, 361 A) FIRST AMENDED ORIGINAL PETITION IN THE DISTRICT COURT OF GALVESTON COUNTY, TEXAS
Plaintiffs	)	
vs.	)	
RELIANCE INSURANCE COMPANY, a Pennsylvania corporation,	)	212th JUDICIAL DISTRICT
Defendant.	)	

PLAINTIFFS' FIRST AMENDED ORIGINAL PETITION

NOW COME Robert C. Hatch and Claudia R. Hatch on their own behalf and on behalf of former trustors of Heritage Trust Company, hereinafter called "Plaintffs," and file this, their First Amended Petition, complaining of and against Reliance Insurance Company, hereinafter called "Reliance" and "Defendant"; and for cause of action would respectfully show unto the Court as follows:

1. Plaintiffs Robert and Claudia Hatch are citizens of the State of Texas and residents of Friendswood, Galveston County, Texas; Plaintiffs Trustors are other citizens of

Texas and other States who, like the Hatches, invested in so-called 'Revocable Intervivos Trusts" sold by Heritage Trust Company, hereinafter called "Heritage," an Arizona corporation now in receivership by order of the Superior Court of Maricopa County, Arizona.

2. Defendant, Reliance Insurance Company, is a foreign corporation, residing in the State of Texas, a commercially domiciled citizen of Texas authorized to do business and doing business in the State of Texas, with registered agent and address for service:

Jerome J. Kwilosz, registered Agent-Reliance Insurance Co., 200 Insurance Plaza Building, 411 N. Akard, Dallas, Texas 75202

BACKGROUND

3. On March 5, 1976, after service of process on the Secretary of State of Texas as statutory agent for Heritage Trust Co., an Arizona corporation, and other out-of-state defendants; and after failure of any defendant to appear or answer, the Honorable Donald Markle, Judge of the 56th Judicial District of the District Court of Galveston County, Texas, giving full consideration to the statutes, rules and judicial decisions of Texas and careful review of the evidence presented by Plaintiffs Hatch in open court, entered a default judgment in favor of Plaintiffs against the defendants, finding conspiracy to defraud and violations of statutes constituting thirteen felonies by Heritage, its president, John H. Bromley, secretary, Bertha Bromley, J. John Mihlik and other specified Heritage employees and co-conspirators (Case No. 114,361).

4. Said judgment for actual and exemplary damages in the sum of $129,972.22 is a valid and final judgment and remains unsatisfied. On April 1, 1976 it was registered as a foreign judgment in Arizona, and has since been sustained in trial by the Superior Court of Maricopa County, Arizona in an action filed by J. John Mihlik, one of the conspirators.

5. On April 16, 1976, the Superintendent of Banks for the State of Arizona was appointed Receiver for Heritage by the Superior Court of Maricopa County, which also issued an injunction against the Hatches and all other trustors of Heritage preventing any enforcement proceedings against Heritage—in Arizona.

6. On or about March 30, 1977—in Texas—Robert and Claudia Hatch caused to be served a Writ of Garnishment on Reliance Insurance Company, a debtor of Heritage. Reliance traversed the allegations of Plaintiffs, denied it was indebted to Heritage and denied it was in any way indebted to Plaintiffs, thus placing in issue the question of the liability of Reliance to third party trustors, to be litigated in Case N. 114,361-A. Throughout its pleadings Reliance consistently denied any liability to third parties, such as trustor plaintiffs herein. Litigation of this question was reserved in pleadings by Plaintiffs, pending adjudication of the garnishment claim. The disputed areas of the suit stemming from garnishment may be briefly defined as:

a) Did service of garnishment on Reliance make it unlawful for Reliance as garnishee to pay Heritage any debt or deliver to Heritage any effects until satisfaction of the Hatch judgment against Heritage, the principal debtor? (the garnishment claim is an issue of law which has been answered in the negative by the United States District Court for the District of Arizona and is therefore not an issue in this amended Petition)

b) Is Reliance indebted to all trustors who suffered losses from acts of fraud or dishonesty committed by employees of Heritage as a result of negligence and conspiring with Heritage officers in the issuance and continuance of the fidelity bond insurance polidy sold to Heritage by Reliance, which in an era notorious for fraud and dishonesty in the sale of Arizona real estate was underwritten by Reliance as a reassuring safeguard ostensibly protecting trustors induced to entrust their savings to

Heritage. The Bond was widely advertised and promoted as being such a safeguard. Reliance had full knowledge of the nature of Heritage's public solicitations and had or reasonably should have had knowledge of past security violations and shady practices by the land fraud conspirators, including the principal officers of Heritage. Yet Reliance worked together with Heritage to construct a Potemkin facade to attract the general public to invest in the scheme; and has since abused legal process to avoid jury trial on these issues of fact.

7. The Commercial Blanket Bond containing the insurance agreement between the parties provides that Reliance will pay for any loss from any fraudulent or dishonest act by any Heritage employee. The limit of liability for any such loss is one million dollars. The sum of all such losses, as estimated by the Heritage Receiver, is from seven to twelve million dollars. The acts of employees which caused losses to Heritage are admitted by Reliance to have commenced at least as early as April 27, 1973. The period of the bonded insurance agreement was from December 15, 1972 to August 15, 1974, when it w s cancelled by Reliance due to an S.E.C. suit for fraud vs. Heritage.

8. This First Amended Original Petition by Plaintiffs sets forth a cause of action on grounds stemming from the second of the two disputed areas recited in sub paragraphs 6b. of paragraph 6. above.

9. We will show the Court that this Original Petition represents a supplement and continuance of Cases #114, 361 A which was dismissed for lack of prosecution by a clerial error as will be shown. (Plaintiffs were enjoined from proceeding with #114,361-A until termination of the interpleader action). On the day set to begin trial in Galveston, the res was removed to the federal courts by an action in interpleader filed by Reliance. By order of the Honorable Walter E. Craig, Judge of the United States District Court for the District of Arizona, Plaintiffs were

enjoined from proceeding to assert fidelity Bond claims in any other state or federal court. On that day also, November 21, 1977, Judge Hugh Gibson ordered a Stay of the Galveston proceedings until the matter was resolved in the federal courts.

10. Plaintiffs moved for a declatory judgment in the U.S. District court on the legal effect of the Texas Writ of Garnishment. The motion was denied by the Honorable Valdemar A. Cordova, Judge of the United States District Court for the District of Arizona; the denial was affirmed by the United States Court of Appeals for the Ninth Circuit; and judicial review of the lower court decisions was refused by the United States Supreme Court which denied Plaintiffs Petition for Certiorari and Petition for Rehearing. The final ruling—the denial of the Petition for Rehearing—was entered on June 6, 1982, constituting the final resolution of the federal proceedings, and the final ruling concerning plaintiffs' claim that their writ of garnishment served on Reliance impounded the Reliance debt to Heritage, the judgment debtor of plaintiffs Hatch. This was held to be the only claim of plaintiffs before the federal courts. Dismissal of the plaintiffs (infra Paragraph 11) from the action in interpleader was without prejudice to their other claims set forth herein.

11. Following the Memorandum Opinion by the U.S. Court of Appeals, on motion by Reliance, Judge Cordova of the U.S. District Court, with no finding on issues other than the effect of garnishment, dismissed the Hatches from the U.S. District Court interpleader case. Almost immediately thereafter, Reliance admitted its liability to Heritage and settled with Heritage by payment of a nominal sum, which, to the best of our knowledge, has been used by the Receiver for expenses and accrued legal fees. The ensuing dismissal of the interpleader case by Judge Cordova was with prejudice, but affected only the remaining parties in the interpleader action: Reliance and the Receiver, acting for

the corporate receivership defendant, Heritage Trust Co. Once again Reliance had successfully avoided a jury trial which Judge Cordova had set for March 30, 1982.

12. Copies of pleadings and proceedings in the U.S. District Court for Arizona and the U.S. Court of Appeals for the Ninth Circuit are available on request from this Court. To avoid repetition we submitted with our Original Petition copies of:

1) Opinion and Order of the U.S. District Court (Exhibit B);
2) Amendment of U.S. District Court Opinion and Order (Exhibit C);
3) Memorandum Opinion of the U.S. Court of Appeals (Exhibit D);
4) Plaintiffs' Petition for Certiotari to the U.S. Supreme Court (Exhibit E);
5) Plaintiffs' Petition for Rehearing to the U.S. Supreme Court (Exhibit F);
6) U.S. District Court Dismissal of Robert and Claudia Hatch from the federal interpleader action (Exhibit G).

13. The enumerated exhibits are among the papers filed in this cause and incorporated by this reference as a part of this First Amended Original Petition.

14. By their Original Petition, filed August 5, 1982, and by this Amendment, Robert and Claudia Hatch, on their own behalf and as representatives of all Heritage trustors, are seeking to be allowed their right to a trial by jury—twice circumvented by the maneuvers of Reliance—on Plaintiffs' factual allegations that Reliance Insurance Company is liable to all defrauded trustors of Heritage Trust Company. The federal courts have ruled that such cause of action was not a claim to be adjudicated in the federal interpleader action (Exhibits D. and G. of Plaintiffs' Original petition, incorporated herein). There are several alternatives and supplemental counts to this cause of action:

15. Count (1): Reliance has abused process by malicious prosecution; by fraudulently using legal proceedings to

injure the Plaintiffs, concealing the real purposes contrary to the expressed purposes of such proceedings, including the filing and service on Plaintiffs of its action in the nature of interpleader; by securing a federal court-ordered injunction enjoining Plaintiffs from proceeding in any other state or federal court; by its misrepresentations in posting an Interpleader Bond and surety to persuade the federal court to preempt jurisdiction from Texas and other state courts; by maliciously "playing the courts" in an effort to exhaust the resources of Plaintiffs as they attempted to gain their day in court, including an ex parte hearing in San Diego by Judge Wallace of the 9th CCA who "Stayed" the dissolution by Judge Craig of his own injunction in the U.S. District Court for Arizona. (Reliance knew that Plaintiffs could not go to San Diego to oppose the Arizona attorneys for Reliance, since Plaintiffs had to oppose Houston attorneys for Reliance at the Galveston trail which was set for that same day, November 21, 1977).

16. By reason of the foregoing, Reliance has twice deprived Plaintiffs of their constitutional right to a trial by jury on the facts of Reliance's liability and has caused grievous financial and emotional injury to Plaintiffs.

17. Count (2): By selling the indemnity bond to Heritage, insuring the trust company and its beneficiary trustors against any loss from any act of fraud or dishonesty by any employee of Heritage, with a limit of liability of one million dollars for any such loss, Reliance knowingly participated in the conspiracy to defraud concocted and carried out by the Bromleys and other employees and co-conspirators. As a co-conspirator, by issuing the Bond Reliance enabled the conspirators to persuade the Hatches and other trustors to entrust their savings to the Heritage trustee, resulting in losses of such savings amounting to a sum, variously estimated by the Heritage Receiver, as from seven to twelve million dollars.

18. By reason of the foregoing, Reliance caused grievous

financial and emotional injury to Plaintiffs.

19. Count (3): Reliance negligently issued the Bond to Heritage without regard to its persuasive effect in solicitations of money from the general public; and carelessly neglected or ignored past derelictions in the record of the principal employee/promoters of the "revocable trust" fraudulent schemes. Furthermore, Reliance negligently continued and maintained the Bond after the Bromleys had acquired ownership of Heritage, despite knowledge by Reliance and its agents of the uses and purposes for which Heritage purchased the Bond and knowledge of representations made by employees of Heritage to prospective investors and trustors. When it entered into the bonded insurance agreement and when it continued the 3-year agreement by accepting annual premiums therefor, Reliance had knowledge of the modus operandi of Heritage including the fact that all money managed by Heritage, as trustee, derived from funds invested by trustors, including the premiums paid by Heritage to Reliance. By virtue of such knowledge Reliance knew or reasonably should have known that the purpose and intent of the insurance agreement was to protect trustors against loss from fraud or dishonesty. Reliance did not deny and took no action with respect to Heritage representations concerning the protection ostensibly given by the Bond to prospective investors and trustors.

20. Plaintiffs would show the Court that a claim of negligence causing injury to defrauded Heritage trustor was reserved by them in their pleadings in Case No. 114,361-A which case is supplemented by this Amended Petition. Following such reservation of plaintiffs' claim of negligence, the Receiver on behalf of the corporation, Heritage Trust Company, amended the complaint in this suit against Reliance in the Superior Court of Maricopa County, Arizona; the Reciever later also amended his answer in the federal interpleader case to include a claim of negligence by

Reliance toward Heritage Trust Company. Plaintiffs contend that damages in the Heritage negligence claim exceeded the million dollar bond and surety posted to achieve and define the federal court jurisdiction in its removal of the Galveston state court action by interpleader process. In any event, negligence by Reliance to Heritage is far different (in the factual elements of duty, breach of duty, cause and injury) from negligence to defrauded investors. The Heritage Trust corporation is an alleged co-conspirator and an admitted collaborator with Reliance in issuing and renewing the bonded insurance agreement. The defrauded investors were induced to entrust their savings as the result of such conspiracy or collaboration. In issuing and maintaining the bonded insurance agreement, Reliance fell far below the standard of reasonable care owed by a fidelity insurance company to the general public, especially senior citizens and persons seeking Keogh plans and other retirement plans as outlined in Heritage sales brochures with which Reliance was familiar. By gross negligence Reliance breached its duties to those persons it knew or reasonably should have known would be relying on the bonded insurance agreement for their ultimate protection against fraud or dishonesty in the solicitation and use of the investments they entrusted to Heritage as trustee.

21. By reason of the foregoing, Reliance caused grievous financial and emotional injury to Plaintiffs.

22. WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray and respectfully demand that upon hearing and trail by jury hereof, Plaintiffs have and recover judgment against Defendant for:

(a) losses represented by the Hatches' final judgment against Heritage in Cas 114,361, other judgments by trustors against Heritage, and other losses of trustors provable by the records of Heritage Trust Company or by individual trustors—the total estimated amount of such losses being the sum of at least seven million dollars;

(b) other actual compensatory and special damages;

(c) costs expended and incurred herein;

(d) exemplary damages for abuse of process, fraud, malice, conspiracy, misrepresentation and gross negligence by Reliance;

(e) reasonable attorneys fees for service by Plaintiffs' attorneys from March 30, 1977, the date of filing this cause against Reliance, to date of payment of this judgment by Reliance;

(f) interest on the total amount of judgment herein, dating from the date of March 30, 1977—the commencement of this cause of action against Reliance—to the date of payment by Reliance, at the legal rates prevailing during the intervening years; and

(g) such other and further relief, special and general, at law and equity, to which Plaintiffs may be jsutly entitled.

Dated this 26th day of January, 1983

The foregoing FIRST AMENDED ORIGINAL PETITION is respectfully submitted by the attorney for Plaintiffs, Robert C. Hatch and Claudia R. Hatch, and on behalf of Other Trustors as described in the Petition,

(signed) Robert B. Cummings
Attorney at Law
383 N. Roberts Way
Camano Island, WA 98292
Phone: (206) 387-9603

I certify that I am mailing a copy of the foregoing First Amended Original Petition to William Haug, Esq., Jennings, Kepner & Haug, 800 Arizona Title Bldg., 111 West Monroe Street, Phoenix, Arizona 85003, attorneys for Reliance Insurance Co. in Case designated CIV-77-843-PHX-VAC in the U.S. District Court for the District of Arizona; and to

David Warden, Esq. of Baker & Botts, One Shell Plaza, Houston, Texas 77002, attorneys for Reliance Insurance Co. in Case designated G 82-358, but not yet accepted by the U.S. District Court for the Southern District of Texas, Galveston Division; and to said U.S. District Courts to file among the papers of said cases.

APPENDIX S-1

FILED 2/22/83
DOCKET #13

February 18, 1983

Honorable Hugh Gibson
Judge
U.S. District Court for the
Southern District of Texas,
Galveston Division
U.S. Courthouse
Galveston, Texas 77550

Re: Hatch v. Reliance
No. G-82-358

Dear Judge Gibson:

In response to a letter dated February 8, 1983 by David Warden, an attorney for Reliance with Baker & Botts of Houston, I am submitting herein the enclosed Opposition to Motion to Strike and renewed Motion to Remand and for Other Relief.

Also enclosed are two copies of plaintiffs' Amended Original Petition in the District Court of Galveston County, Texas. I respectfully move for leave of Court to file this amendment in your Court, since it is obvious from his motion to strike that Mr. Warden opposes the filing of the amendment.

By copy of this letter I am advising the Reliance Houston attorneys of this Motion.

Very truly yours,

Robert B. Cumming
Attorney for Plaintiffs

enc:
Opposition to Motion to Strike;
Motion to Remand and for Other
Relief (2 copies)
Amended Original Petition (2 copies)

cc: David Warden, Esq. (CM RRR)

APPENDIX T

HERITAGE TRUST COMPANY SCHEDULE SHOWING NUMBER OF INVESTORS IN EACH 83 ACCOUNT

Trust Number	Name	Average Loss Per Investor	Total Number of Investors*	Loss Amounts From Trusts**
83-01	New Life Trust	3429	35	$ 120,200
83-02	Sunshine Land	6149	144	995,561
83-03	Promotora 70	3953	11	43,482
83-04	Thunderbird	4966	100	496,624
83-05	Western Land Sales	4922	43	211,266
83-06	Edward Bankers	3017	29	87,500
83-07	World Art	407	123	50,000
83-09	Litchfield Land	6156	175	1,077,257
83-10	Scott	11357	71	806,381
83-11	Western National Land		1	not reported
83-12	Lake Conroe Hills	2846	79	224,821
83-13	REACT—Henry Schulle	3250	25	81,250
83-15	N.J. Venture	10417	21	218,750
83-16	Gearner Schulle	7359	12	88,312
83-17	Bear Lane	4076	23	93,750
83-18	Walters & Fields	7762	49	380,358
83-19	S.W. Venture	2569	90	231,250
83-20	Sanderson	3993	116	456,250
83-21	Morgan S.C. I	93750	2	187,500
83-22	Henke		12	0
83-23	Bahia Kino	4923	45	221,556
83-24	Milam & Gray	21528	9	193,750
83-25	Austin Venture	20141	11	221,556
	Misc Notes (50)		13	—
83-26	Omid-Gaf	1888	30	—
	Misc. Mortgages		21	
83-27	Stevenson	3755	66	247,692

83-28	Morgan S.C. II	3378	148	500,000
83-29	Klock I	4753	51	242,427
83-30	Scheh-Cordell	5235	24	125,637
83-31	Melber	2025	47	95,165
83-32	Klock II	5012	52	260,635
83-33	Ericson Development	1507	74	111,478
83-34	"Ken Square Partners"	4000	5	20,000
			1782	$8,087,063

Average loss is 8,087,063 divided by 1,782 equals $4538.

*Report of 8/13/76
**Report of 7/16/79

APPENDIX U

56TH DISTRICT COURT
GALVESTON COUNTY
County Courthouse
Galveston, Texas 77550

I. Allan Lerner
Judge

16 November 1981

Mr. Robert B. Cumming
Attorney at Law
383 No. Roberts Way
Camano Island, Washington 98292

Re: #114,361—Hatch vs. Heritage
#114,361-A—Hatch vs. Reliance

Dear Mr. Cumming:

I received your letter dated 3 November 1981 relative to above. I am enclosing a copy of 165A which, as I read it, gives me no authority to set aside the Order of Dismissal. All I can suggest to another suit for garnishment be filed as limitations should not affect the garnishment suit.

Very truly yours,

J.A. Lerner
Judge

APPENDIX V

ROBERT C. CUMMING
Attorney and Counselor at Law
Suite 390 3637 W. Alabama
Houston, Texas 77027
(713) 626-5513

January 3, 1978

Mr. V.J. Beninati, Jr.
District Clerk
Galveston County Courthouse
Galveston, Texas 77550

Re: No. 114,361-A—Robert C. Hatch and Claudia R. Hatch vs. Reliance Insurance Company—in the 56th District Court of Galveston County, Texas

Dear Sir:

Would you please advise the Honorable Presiding Judge that the attorneys for the parties in the above-referenced case have agreed that this case may be passed from its trial setting of January 9, 1978, due to a stay order issued by a Federal Court.

Thank you for your assistance in this matter.

Very truly yours,

Robert B. Cumming
Attorney for Plaintiffs

James Wyckoff
Attorney for Defendant

APPENDIX W

Article 5529, Vol. 16A, Vernon's Civil Statutes of the State of Texas Annotated (including 1985 pocket part):

5529. All other actions barred, when

Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring same shall have occurred and not afterward.

APPENDIX X

CASE NO. 82-358
GALVESTON DISTRICT COURT
(Text of Handwritten Note)

Mr. Cumming,

This case has been transferred to Arizona and this Court no longer has the file on this case.

Hugh Bartlett

APPENDIX Y

PERTINENT PROVISIONS OF TITLE 28, UNITED STATES CODE

28 U.S.C. § 1254

Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

28 U.S.C. § 1332

Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and is between—

(1) citizens of different states.

** ** **

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counter claim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further,

That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

* * *

28 U.S.C. § 1441

Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

* * *

28 U.S.C. § 1446

Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action . . .

* * *

(e) Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

28 U.S.C. § 1652

State laws as rules of decision

The laws of the several states except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 1738

State and Territorial statutes and judicial proceedings; full faith and credit

* * *

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

APPENDIX Z

TEXAS RULES OF CIVIL PROCEDURE

RULE 42. CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injuctive relief or corresponding declatory relief with respect to the class as a whole; or

(3) where the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(4) the court finds that the questions of law or fact

common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall, after hearing, determine by order whether it is to be so maintained. This determination may be altered, amended, or withdrawn at any time before final judgment. The court may order the naming of additional parties in order to insure the adequacy of representation.

(2) After the court has determined that a class action may be maintained it shall order the party claiming the class action to direct to the members of the class the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort. In all class actions maintained under subdivisions (b)(1), (b)(2), and (b)(3), this notice shall advise the members of the class (A) the nature of the suit, (B) the binding effect of the judgment, whether favorable or not, and (C) the right of any members to appear before the court and challenge the court's determinations as to the class and its representatives. In all class actions maintained under subdivision (b)(4) this notice shall advise each

member of the class (A) the nature of the suit; (B) that the court will exclude him from the class if he so requests by a specified date; (C) that the judgment, whether favorable or not, will include and bind all members who do not request exclusion by the specified date; and (D) that any member who does not request exclusion may if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivisions (b)(1), (b)(2), and (b)(3), whether or not favorable to the class, shall include, describe, and be binding upon all those whom the court finds to be members of the class and who received notice as provided in subdivision (c)(2). The judgment in an action maintained as a class action under subdivision (b)(4), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(d) Actions Conducted Partially as Class Actions. When appropriate (1) an action may be brought or maintained as a class action with respect to particular issues, or (2) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Discovery. Unnamed members of a class action are not to be considered as parties for purposes of discovery.

(g) Effective Date. This rule shall be effective only with respect to actions commenced on or after September 1, 1977. Amended by order of September 20, 1941, effective December 31, 1941; order of May 9, 1977, effective Sept. 1, 1977.

Source: Federal Rule 23.

Rule 42 is completely rewritten. Section (a) is copied from revised federal rule 23(a). Section (b)(1) is copied from revised federal rule 23(b)(2). Section (b)(2) is copied from revised federal rule 23(b)(2). Section (b)(3) is taken from present Texas rule 42(a)(3), omitting the reference to the character of the right as "several." Section (B)(4) is adopted from revised federal rule 23(b)(3). Section (c)(1) is adopted from revised federal rule (c)(1) with little change except in the choice of words. The second sequence in proposed (c)(1) is not found in the federal rule although the idea is implied herein. Section (d) is copied from revised federal rule 23(c)(4). Section (e) is copied from revised federal rule 23(e).

APPENDIX Z-1

TEXAS RULES OF CIVIL PROCEDURE

Rule 65. Substituted Instrument Takes Place of Original

Unless the substituted instrument shall be set aside on exceptions, the instrument for which it is substituted shall no longer be regarded as a part of the pleading in the record of the cause, unless some error of the court in deciding upon the necessity of the amendment, or otherwise in superceding it, be complained of, and exception taken to the action of the court, or unless it be necessary to look to the superceded pleading upon a question of limitation.

Supreme Court, U.S.
FILED
NOV 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-641

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT C. HATCH and CLAUDIA R. HATCH
Petitioners,

vs.

RELIANCE INSURANCE COMPANY, a corporation,
Respondent.

RESPONDENT RELIANCE INSURANCE COMPANY'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

By JOHN R. CUNNINGHAM
JENNINGS, KEPNER & HAUG
800 Arizona Title Building
Phoenix, Arizona 85003

Attorneys for Respondent
Reliance Insurance Company

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court err in dismissing petitioner's claim on five separate grounds, each of which, as held by the United States Court of Appeals for the 9th Circuit, constituted a proper, independent and sufficient basis for dismissal?

2. May federal court jurisdiction in this matter be defeated by petitioners' attempted placement before this Court of an outside-the-record document and patently erroneous arguments based on that outside-the-record document?

3. Is respondent herein entitled to sanctions against petitioners and petitioners' counsel pursuant to the provisions of 28 U.S.C. § 1927 and Rule 49.2, Rules of the Supreme Court of the United States?

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Ward v. *Conner*, 495 F.Supp. 434 (1980), rev'd on other grounds 657 F.2d 45 (4th Cir. 1981), cert.den. 455 U.S. 907 (1982) 18

Wecker v. *National Enameling & Stamping Co.*, 204 U.S. 1976 (1907) 17

Wilson v. *Republic Iron & Steel Co.*, 257 U.S. 92 (1921) 16

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c. Treatises and Texts

Moore's Federal Practice
Vol. 1, ¶ 0.92 [1] 16
Vol. 1A, ¶ 0.168[4-1] 17

Wright, Miller & Cooper, Federal Practice and Procedure, Jurisdiction 2d
Vol. 14A, § 3701 16
§ 3702 15
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-641

ROBERT C. HATCH and CLAUDIA R. HATCH
Petitioners,

vs.

RELIANCE INSURANCE COMPANY, a corporation,
Respondent.

RESPONDENT RELIANCE INSURANCE COMPANY'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RELEVANT STATUTORY PROVISIONS

Respondent requests relief in this matter pursuant to the provisions of 28 U.S.C. § 1927 which provides as follows:

> § 1927. Counsel's liability for excessive costs
>
> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

STATEMENT OF THE CASE

I. Prefatory Note:

This cause and a related predecessor action[1] involving the same parties have now been occupying court time for more than ten years. The instant Petition for Writ of Certiorari represents the third time that the petitioners and their counsel have petitioned

1. The federal interpleader action, Cause No. 77-834 in the United States District Court for the District of Arizona.

this Court for such relief. Petitioners have also prosecuted three appeals to the Ninth Circuit and have once unsuccessfully petitioned the Fifth Circuit for writ of mandamus. Petitioners have not prevailed on any aspect of their numerous prior petitions or appeals. Petitioners and their counsel continue to seek to relitigate the same issues over and over no matter how many times those issues are decided adversely to them. In the instant Petition before this Court, petitioners continue to set forth, as "facts," numerous contentions and issues which have long since been fully and finally decided adversely to them in prior proceedings. Petitioners seek to introduce new issues through the interjection of "evidence" and documents which are outside of the record. The result of such tactics is obfuscation and confusion of the facts, record and issues in this matter to the point of virtual unintelligibility.

Therefore, pursuant to Rule 34.2., Rules of the Supreme Court of the United States, respondent, being dissatisfied with petitioners' Statement of the Case, presents the following. Such is deemed necessary as a result of petitioners' gross mischaracterizations of the actions and rulings of the Courts below, and by their attempted interjection of documents outside of the record. Respondent presents the following chronology of relevant events in the hope and belief that it will assist this Court in clarifying and defining matters germane to the rulings of the District Courts in Texas and Arizona, and the Opinion of the 9th Circuit Court of Appeals affirming the District Court rulings.

II. Procedural Background and Chronology:

The procedural history of this matter is set forth in the Court of Appeals Opinion and need not be repeated herein. The Complaint brought by petitioners in the case at bench is set forth as Appendix R to their Petition. As noted by the Court of Appeals, the instant lawsuit was filed by petitioners in the face of a federal court order enjoining the action (Appendix A-1, hereto), and represents an attempt by petitioners to relitigate matters which

had been fully and finally resolved in the prior federal interpleader action.

Approximately one month after this Court entered its Order denying rehearing of its denial of the petition for writ of certiorari in the earlier interpleader action, petitioners and their counsel, being displeased with the decisions of the federal courts, went back to the Galveston County court and filed a new "Petition", summoning respondent back into the Texas state courthouse and seeking to once again litigate petitioners' claims against respondent pertaining to the issuance of the commercial blanket fidelity bond. In addition to the attempted relitigation of the bond claims (which litigation had been permanently enjoined by the federal court's Injunction of March 6, 1978), petitioners' counsel added several new theories and requests for relief to his imaginative new Petition. In addition to the attempted relitigation of the original contentions which the petitioners had unsuccessfully litigated in the interpleader action, petitioners and their counsel sought the following additional relief in the Texas state court action: (1) to have the Texas court declare that the "interpleader proceedings and Orders by the federal courts are invalid and must be considered null and void and of no force or effect . . ." (See Petition, Paragraph 18) (Appendix R to Petitioners' brief); (2) to have the Texas court overrule all federal court rulings in the interpleader action on the basis that those rulings were "based on gross errors of law by the U.S. District Court" (Petition, Paragraph 21) which "errors" were "compounded by the [gross errors of] the U.S. Court of Appeals for the Ninth Circuit" (Petition, Paragraph 22); (3) to have the Texas court declare Rule 21 of the Rules of the U.S. Court of Appeals for the 9th Circuit to be unconstitutional and unenforceable (Petition, Paragraphs 22 and 23); (4) to have the Texas court determine that "the U.S. Supreme Court denies full judicial review promised by the U.S. Constitution and denies due process under the Fourteenth Amendment. [And therefore] the only available remedy for such injustice on the federal level is for the courts of the sovereign states of the union to reassert jurisdiction and grant review of

legal issues [notwithstanding the prior rulings on these issues by the federal courts,]" (Petition, Paragraph 24); (5) to obtain a ruling that respondent, by virtue of having invoked the federal interpleader remedy, was liable to petitioners for "abuse of process" (Petition, Paragraph 29); and (6) to obtain a ruling that respondent was liable to all trustors of Heritage, in tort, because it negligently failed to investigate Heritage before issuing the bond and because it negligently failed to discover that Heritage was misrepresenting the scope and coverage of the bond to prospective investors (Petition, Paragraphs 33, 35 and 36.). It should be noted that the alleged tort claims, alleged by petitioners on their own behalf and on behalf of the supposed "class" of trustors, are the identical claims which were litigated and resolved by the Receiver, on behalf of all trustors, in the earlier interpleader proceeding. (Opinion, pp. 12,13) As a result of the filing of this Complaint, in violation of the federal court injunction, petitioners' counsel was held in contempt by Judge Valdemar A. Cordova, Judge of the United States District Court for the District of Arizona, and was ordered to forthwith amend his Complaint to remove all matters which were in violation of the permanent injunction.

Petitioners' strident efforts to avoid removal of the new Texas action to federal court are noted by the Court of Appeals. (Opinion, p. 8) Petitioners filed numerous documents in opposition to removal, including various motions seeking dismissal of the petition for removal and seeking remand of the cause to state court. On June 29, 1983, the Honorable Hugh Gibson, United States District Court Judge for the Southern District of Texas, entered his Order confirming that the removal of the cause to federal court was proper, and denying petitioners' various motions for dismissal and remand to the Texas state court. (Appendix A-2) On the same date, Judge Gibson entered Orders (1) transferring venue of this cause to the District Court for Arizona (Appendix A-3), and (2) denying a motion by petitioners to join a non-diverse defendant (in an attempt to defeat diversity jurisdiction), and ordering petitioners to file an amended complaint within 10

days, excising all contemptuous counts. (Appendix A-4). Notwithstanding this Order from Judge Gibson, and the earlier Order of Judge Cordova, petitioners never filed the required amended pleadings. (Opinion, p. 11)

Petitioners sought relief from Judge Gibson's Orders by Petition for Writ of Mandamus to the 5th Circuit, Petition for En Banc Rehearing after the 5th Circuit denial of mandamus, and Petition for Writ of Certiorari to this Court, all of which were denied.

For nine months petitioners did nothing with respect to the prosecution of the transferred action in the Arizona District Court. On March 27, 1984, the court issued its *sua sponte* Order wherein it noted that "although named plaintiffs and their counsel purport to represent a class consisting of 'Trustors of Heritage Trust Company', a request to certify the class pursuant to Rule 23 (c)(1) Federal Rules of Civil Procedure, has never been made nor such an order entered." (Appendix A-5)

Thereafter on April 9, 1984, petitioners' counsel filed a Motion to Designate Class and Certify Class, by which he sought certification of petitioners' claims as a class action and further sought to have petitioners designated as class representatives. At no time prior to this had petitioners sought to have this matter certified—not in state court or federal court. Petitioners' claims that the claim had been "accepted" as a class action by the state court are simply untrue. Petitioners' contention that they represent anyone other than themselves is based solely upon the fact that they filed a complaint which contains a caption containing their names along with the further designation "Trustors of Heritage Trust Company," and, by the allegations contained therein, petitioners sought to relitigate, on behalf of the trustors, the claims already resolved in the federal interpleader action.

On April 16, 1984, respondent filed its Motion to Dismiss and its Response to petitioners' Motion for Certification of the matter as a class action. Petitioners responded to the Motion to Dismiss and both motions were set for hearing on April 30, 1984, along with a pending discovery motion whereby petitioners' counsel was

seeking to force the state court Receiver to provide him with a list of trustors so that he could solicit plaintiffs for his alleged "class." After hearing argument on all issues, the Hon. William P. Copple, United States District Court Judge, District of Arizona, indicated on the record that, in light of the involved procedural history in this matter, and due to its interrelationship with the earlier interpleader action, he had reviewed the entire history of this matter, including the entire file in the earlier interpleader action. In ruling on the several motions, Judge Copple stated:

> THE COURT: Well, I have read the file in the interpleader action, Reliance versus Koeb, which was before Judge Cordova; the contempt proceedings against Mr. Cumming. I have read the pleadings in this case, including the memorandum by Mr. Cumming in support of the motion to remand in Judge Gibson's court in Texas. I have read the memorandum in his unsuccessful appeal to the Fifth Circuit from the ruling from Judge Gibson. I have read the memorandum in support of his petition for cert. to the United States Supreme Court, which was denied.
>
> I find that Mr. Cumming has some very original and unique ideas about res judicata and the relationship of federal and state courts and the supremacy clause of the Constitution, which brings me to the motion to designate a class action and to certify the class.
>
> Rule 23(c) requires that I make a finding that the named plaintiffs and their counsel will adequately represent the class.
>
> In this particular case, after reviewing all of the documents filed by Mr. Cumming, the proceedings before Judge Cordova, I have to find that, because of the total incompetency of counsel, the named plaintiffs cannot adequately represent the class and, therefore, I must deny certification of the class, even should such class exist, and I'm not sure it does.
>
> And I think all of the actions by the class in tort are barred by the statute of limitations, anyway.
>
> * * *

> And as to the motion to dismiss, the actions are barred by [petitioners' counsel's] failure to purge himself of contempt and to file, as ordered by Judge Gibson, an amended complaint; barred by the statute of limitations in tort; barred by res judicata; barred because it fails to state a legal claim and failure to be a plain, simple statement of the facts as required by Rule 8 of the Federal Rules of Civil Procedure as to both the proposed complaint which he never filed, although having been ordered to do so, and the complaint which was filed in contempt of court in Texas.
>
> Therefore, the clerk will enter judgment dismissing the complaint and action in all respects, the entire case, with prejudice.

A formal order was subsequently entered dismissing the cause and the petitioners appealed to the Ninth Circuit Court of Appeals.

Petitioners renewed their arguments relating to the propriety of the removal in their opening Brief before the Ninth Circuit. At no time, however, did petitioners ever argue or even suggest, either in the Texas or Arizona District Courts, or in the Opening Brief in the Court of Appeals, that there existed any issue relating to the "amount in controversy" requirement of 28 U.S.C. § 1332.

As noted in the Court of Appeals Opinion, petitioners, in their Reply Brief, made an assertion that the $10,000 amount in controversy requirement was not met in this matter. This was the first time any such an assertion had been raised. (Opinion, footnote 1.) Petitioners do not argue that their claim does not meet the jurisdictional amount requirement, for clearly it does. Rather, they assert that the claims of some of the members of the alleged "class" which they purport to represent, are less than the required $10,000. In an effort to give substance to this argument, petitioners inserted into their Reply Brief in the Court of Appeals, a document, created by petitioners' counsel, which was totally outside of the record in this proceeding. By this document, petitioners claim to establish that the supposed claims of some members of the alleged class are less than $10,000. For

reasons discussed, *infra,* petitioners' argument not only reaches outside the record—it is based upon totally spurious legal and factual analysis.

Petitioners' newly derived "amount in controversy" argument was rejected by the Ninth Circuit, as were their numerous other assignments of error relating to both the propriety of the removal and the propriety of the dismissal. The Court of Appeals further assessed costs and attorneys' fees against petitioners and their counsel, noting that their appeal was frivolous and that the entire proceeding constituted a gross abuse of the litigation process:

> This litigation has been ongoing for more than nine years. By filing this case in the Texas state court, by maintaining it in the federal district court, and by taking and prosecuting this appeal, appellants' counsel has grossly abused the judicial process. Appellants' counsel's persistent attempts to relitigate matters previously and finally determined demonstrate either a lack of understanding or a flagrant disregard of fundamental principles of res judicata and federalism. Counsel has ignored prior court orders and the Federal Rules of Procedure. Appellees have expended large amounts of time and money defending against the numerous and poorly drafted pleadings filed by appellants in this and related proceedings. The right of these defendants to be free from this costly litigation and the rights of other litigants must be considered. The instant appeal is frivolous.

(Opinion, pp. 15-16)

Petitioners continue the process by seeking intervention of this Court, by Petition for Certiorari filed on October 11, 1985.

SUMMARY OF ARGUMENT

The district court based its dismissal of petitioners' action on five separate and independent grounds. As held by the Court of Appeals, any one of the five grounds cited by the district court would have been sufficient to sustain the dismissal. In this case, *each* of the five grounds cited by the district court provided an

independent, proper and sufficient basis for dismissal. (Opinion, p. 10)

By their complaint in the Texas state court, petitioners sought to have the prior rulings of Arizona District Court, the Ninth Circuit Court of Appeals, and of this, the United States Supreme Court, declared "null and void", and asked that the state court "reassert jurisdiction" over those matters which had previously been fully and finally decided in the prior federal court proceeding. Petitioners further sought, by their complaint, to relitigate those matters decided adversely to them by the federal courts in the earlier interpleader action. The complaint seeks specified compensatory damages, "in excess of $7,000,000," plus unspecified punitive damages, additional compensatory damages, and attorney's fees. The matter was properly removed from the Texas state court to the federal court pursant to 28 U.S.C. § 1441.

Petitioners' argument that the "amount in controversy" requirement has not been met is both meritless and improper. Not only is petitioners' argument based on a self-created, outside-the-record document, it is based on patently erroneous factual and legal analysis. Further, and as held by the District Court and affirmed by the Court of Appeals, there exists no "class" and there exist no claims to be made on behalf of any supposed members of the alleged class.

The existence of federal jurisdiction is a matter of federal, and not state, law. In order to divest the federal courts of jurisdiction, petitioners would be required to demonstrate to a legal certainty, that the subject claim does not meet the jurisdictional requisite. Petitioners make no showing which even approaches this standard. Petitioners may not assert sham, false or merely colorable claims in order to defeat diversity jurisdiction. The determination of facts regarding jurisdictional questions, when those questions, are properly raised, are to be decided by the federal court.

Respondent respectfully urges that petitioners' action in filing the instant Petition for Writ of Certiorari is frivolous and that Respondent is entitled to sanctions pursuant to Rule 49.2, Rules

of the Supreme Court of the United States, 28 U.S.C. § 1927, and pursuant to the inherent powers of this Court.

ARGUMENT

I. The Decision of the Court of Appeals, Affirming the District Court's Dismissal of Petitioners' Action, Is Proper.

Petitioners advise this Court that the dismissal of their action by the Arizona District Court and the affirmance of that dismissal by the Court of Appeals is due to a "peculiar animus" and "injudicious hostility" which those courts have exhibited against petitioners. This is nonsense. Petitioners offer absolutely no legal or factual analysis suggesting that the dismissal of their cause was improper. To the contrary, and as noted by the Court of Appeals in its Opinion, affirmance of the dismissal would have been required if any *one* of the five grounds cited by the district court was supported by the record. The court held that *each* of the separate grounds relied upon by the district court provided an independent, proper and sufficient ground for dismissal. We will not unduly lengthen this Brief by repeating the cogent recitation and analysis of those issues which are set forth in the panel's Opinion.

II. The Cause Was Properly Removed to Federal Court; Petitioners' Arguments Regarding "Amount In Controversy" Are Both Frivolous and Improper.

This matter was removed from the Galveston County Court to the federal district court in Texas pursuant to 28 U.S.C. § 1441. Petitioners vehemently contested the propriety of that removal in both the Texas District Court (including a petition for writ of mandamus to the Fifth Circuit and a prior petition for writ of certiorari to this Court), and in their Opening Brief in the Ninth Circuit. The propriety of the removal was thoroughly analyzed and discussed in Judge Gibson's Order denying petitioners' motion for remand (Appendix A-4) and in the Opinion of the Court of Appeals.

At the Reply Brief level in the Court of Appeals, counsel for petitioners raised, for the first time, an argument relating to the amount in controversy. This argument appears to have become their primary focus in the instant Petition for Writ of Certiorari. Petitioners assert that, although their complaint seeks compensatory damages in excess of seven milion dollars, plus punitive damages, attorney's fees and costs incurred in prior proceedings, and "other actual compensatory and special damages," the requirement that the amount in controversy exceed $10,000 has not been satisfied Petitioners do not argue that their own claim does not meet the $10,000 requisite. Rather, they argue that the supposed claims of some of the members of their alleged "class" do not reach this jurisdictional threshold.

The argument fails on a number of grounds:

(1) There is no "class" of trustors. The action was never certified as a class action in the Texas state court or in the federal courts. When petitioners finally sought class certification, it was denied. Petitioners and their counsel do not now, and have never at any time represented anyone other than themselves.

(2) The claims which petitioners purport to bring on behalf of the alleged class of trustors were already litigated on behalf of the trustors by the Receiver in the earlier interpleader action. As noted by the Court of Appeals in affirming dismissal of petitioners' action on res judicata grounds:

> The tort claims alleged by appellants were pleaded, litigated and resolved in the federal interpleader action. Those matters may not now be relitigated.

(Opinion, p. 12)

Thus, there exists no class and there exist no claims.

(3) Even if one were to ignore the above, the obvious fact is that any claim which any trustor conceivably could have had out of the events in question, would have long since been time-barred. (Opinion, p. 11) It has now been more than 11 years since the subject fidelity bond was cancelled. With the exception of the tort claims made by the Receiver in the interpleader action on behalf of all trustors, there has never been any claim or even

inquiry from any trustor relating to any potential claim on the bond or against respondent, other than petitioners' perpetual litigative assault. It is difficult to conceive of any basis for petitioners' claim that they represent some unknown but actual class of persons with viable claims. Obviously, they do not. Yet they come before this Court, claiming not only to represent such unknown persons, but also claim that these unknown persons with unknown but somehow viable claims divest the federal courts of diversity jurisdiction.

Petitioners further purport to "prove" that the alleged claims of the members of this supposed class of trustors do not meet the jurisdictional minimum with an interesting piece of factual and legal analysis: Petitioners' counsel has taken certain information contained in two reports prepared by the Receiver in the Arizona state court receivership proceeding and has modified those reports by his own interpretive notations, and attempted to place this self-created document before the appellate courts by inserting it into petitioners' Reply Brief at the Court of Appeals. The document is not a part of the record in this proceeding, and, as was noted at oral argument at the Court of Appeals, its attempted insertion into the appellate record is patently and grossly improper.

Before this court, petitioners argue that their self-created document "proves" that the supposed claims of the alleged class of trustors average less than $10,000 each. In addition to going outside the record, petitioners' argument is fraught with patently erroneous analysis. Simply stated, what petitioners have done is to extract a page from a Receiver's report, which page dealt with certain investments made by Heritage Trust Company in ventures which were denominated as "83 Accounts." Petitioners' counsel then totaled the column which he has designated as "Loss Amounts from Trusts," and has totaled the column which he has entitled "Total Number of Investors." He then divided the sum of the "Loss Amounts" column by the sum of the "Number of Investors" column, and instructs the Court that, since this process yields a quotient of $4,538, this "proves" that the claims of his

imaginary class of plaintiffs do not equal $10,000. Therefore, he argues, diversity jurisdiction is destroyed.

We set aside the fundamental facts that there is no class of plaintiffs, and that there are no extant claims, and address the blatant fallacies of petitioners' analysis:

(1) only approximately 500 Heritage trustors had funds placed, by Heritage, in the "83 Accounts." Note, however, that when the columns of "Total Number of Investors" are added, the sum is 1,782 and this is the number which petitioners' counsel used as the divisor in his "proof" that the supposed claims of the individual trustors must be less than $10,000. But there were not 1,782 different trustors involved in "83 Accounts"—as stated above, there were only approximately 500. The mathematical explanation for this is apparent—a single investor's money was usually divided among numerous "83 Accounts." As a hypothetical example, if a single trustor placed $15,000 with Heritage for investment, Heritage might take that $15,000 and invest in numerous different ventures—perhaps $3,000 would be invested in each of five different "83 Account" ventures, or $1,500 would be placed in each of ten different "83 Account" ventures. That same single trustor would then show up, respectively, as five or ten different trustors in petitioners' calculations. In the former example, he would show up as 5 different investors, each having a $3,000 average loss. In the latter, this single trustor would show up as 10 different investors, each with an average loss of $1,500. But, of course, he is neither—he is one investor with a $15,000 loss.

(2) A second fallacy in petitioners' calculations is that losses sustained by trustors in the "83 Accounts" do not represent all losses sustained in the Heritage failure. Additional losses totalling approximately $4,000,000 (per the Receiver) were sustained in matter separate and apart from the investments in "83 Accounts." Thus, if we again take the hypothetical trustor, who, on a given occasion invested $15,000 with Heritage, it may well be that only a portion of those funds were placed in the "83

Accounts." $5,000 may have been diverted to some other purpose while $10,000 was placed in various "83 Accounts." Thus, the column designated "total loss of trustors" as calculated by petitioners' counsel in his "proof" is also fallacious. That number represents only the total of funds placed in the "83 Accounts." Not only is the divisor in petitioners' calculation in error, so is the dividend. Petitioners have divided a meaningless number by a meaningless number, and have thereby arrived at a quotient which they contend defeats federal jurisdiction and mandates remand.

(3) In addition to the above, the Court may note that several of the "Loss Amounts," as designated in petitioners' self-created document, are shown as "not reported" or are simply left blank. Do petitioners not recognize that such omissions, separate and apart from the other errors, render their calculation meaningless?

(4) In petitioners' pleadings, and throughout these proceedings, petitioners have claimed damages, not only for amounts alleged to have been lost by petitioners and the supposed class of trustors through Heritage investment practices, but also have claimed numerous additional "actual compensatory and special damages," "exemplary damages for fraud, malice, misrepresentation and negligence by Reliance," and, as additional compensatory damages, have made claim for attorney's fees, costs, and expenses incurred, *not* in the instant matter but in the prior federal interpleader action. Such claims would properly be included in computing a jurisdictional amount. Wright, Miller & Cooper 14A, *Federal Practice and Procedure:* Jurisdiction 2d § 3712 at p. 175. Their claim to punitive or exemplary damages would also be considered. *Bell* v. *Prefered Life Assur. Soc. of Montgomery, Ala.*, 320 U.S. 238 (1943); *Loss* v. *Blankenship*, 673 F.2d 942 (7th Cir. 1982). Yet these additional claims of damage, each of which is set forth in petitioners' complaint, are unmentioned and unaccounted for in the mathematical exercise presented by petitioners in their Petition.

The above matters are set forth to demonstrate the absurdity of petitioners' contention that they have established, by placing an

outside-the-record document before the Court and arguing therefrom, that there is an extant class of plaintiffs with viable claims that defeat federal jurisdiction. By no stretch could this presentation be said to meet the required "legal certainty" standard to divest the Court of jurisdiction. Wright, Miller & Cooper 14A, *Federal Practice and Procedure,* Jurisdiction 2d § 3702 at pp. 48, 49.

It has long been the law that in determining whether a basis for federal diversity jurisdiction exists, the Court looks to the claims set forth in plaintiffs' complaint. To justify dismissal or remand, it must appear to a *legal certainty* that the claim is for less than the requisite jurisdictional amount. *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.,* 303 U.S. 283 (1938); Wright, Miller & Cooper 14A, *Federal Practice and Procedure,* Jurisdiction 2d § 3702 at pp. 12-16. Once removal jurisdiction attaches, machinations by the plaintiffs to reduce the claim to less than the jurisdiction requisite cannot operate to oust the court of jurisdiciton. *St. Paul Indemnity Co.* v. *Red Cab Co., supra* at p. 292.

In the instant case, petitioners filed their complaint alleging claims for more than $7,000,000 in compensatory damages and additionally claimed punitive damages, attorney's fees, and other general damages. They further requested that the state court declare all prior federal court actions, decisions and procedures to be null and void and requested that said state court "reassert jurisdiction" over those matters which had been decided adversely to them in the prior proceedings in the federal courts. Finally, petitioners purported to bring this multimillion dollar action on behalf of themselves and an alleged class consisting of "trustors of Heritage Trust Company."

The petitioners and their counsel do not now, nor have they ever, represented any "trustor" other than themselves. Moreover, and as determined by both the district court and the Court of Appeals, the claims which petitioners purport to bring on behalf of the trustors were fully and finally litigated and resolved in the interpleader action. (Opinion, p. 13) Additionally, and even if one were to ignore the bar of res judicata, the supposed

claims of any and all trustors would be long since barred by limitations. (Opinion, p. 11)

The existence of federal jurisdiction is a question of federal, not state, law. *Kramer* v. *Carribean Mills, Inc.*, 394 U.S. 823 (1969). Facts necessary to a determination of removal jurisdiction are to be considered by the federal court and not by the state court. *Gentle* v. *Lamb-Weston, Inc.*, 302 F.Supp. 161, 166 (1969), *citing, Wilson* v. *Republic Iron & Steel Co.*, 257 U.S. 92 (1921); Wright, Miller & Cooper 14A, *Federal Practice and Procedure*, Jurisdiction 2d, § 3701 at p. 23. Once a removal petition is filed, the federal court must determine whether the claims actually at issue meet jurisdictional requirements. A litigant may neither create nor defeat diversity jurisdiction by the mere inclusion of sham claims or merely "colorable" claims in his complaint. *Columbia Pictures Corporation* v. *Grengs*, 257 F.2d 45 (7th Cir. 1958); *Emland Builders, Inc.* v. *Shea*, 359 F.2d 927 (10th Cir. 1966).

In the instant matter, the removal petition properly set forth that "The amount in controversy, exclusive of interests and costs, exceeds $10,000." Petitioners argue that this somehow constitutes improper pleading of this jurisdictional fact. *Moore's Federal Practice*, however, notes that this is the precise manner in which this jurisdictional fact should be alleged:

> In diversity cases, the allegation should be substantially as follows:
>
> "The matter in controversy exceeds, exclusive of interests and costs, the sum of ten thousand dollars."
>
> This constitutes good pleading of this jurisdictional fact. (citing cases)
>
> 1 Moore's Federal Practice
> ¶ 0.92 [1] at pp. 860-861

The allegations set forth in respondent's removal petition regarding the "amount in controversy" were never challenged by petitioners, and were thus deemed true:

> Inasmuch as the jurisdictional facts alleged in the removal petition and those otherwise disclosed by the record constitute the basis for federal jurisdiction, if the petition affirmatively shows on its face the necessary jurisdictional facts and these are not contradicted by the record, the motion to remand must challenge these allegations or they will be deemed true. Thus a motion to remand which fails to put in issue the averments of the petition raises only the legal sufficiency of the factual allegations and the party seeking removal is not required to furnish proof of the allegations. If, however, plaintiff properly takes issue with a material allegation of defendant's petition for removal, the issue so arising must be heard and determined *by the federal district court.*
>
> 1A Moore's Federal Practice
> ¶ 0.168 [4-1] at pp. 645-646 (emphasis supplied)

When petitioners sought to obtain class certification, and to obtain designation as class representatives, they were denied. In denying petitioners' request, the district court noted not only the incompetency of counsel and its (the court's) doubts as to whether any "class" existed, but also held that the claims which petitioners were purporting to bring on behalf of the supposed class had already been fully and finally adjudicated in the earlier interpleader action. The court further observed that the alleged claims were barred by limitations. These rulings were affirmed on appeal. We now have petitioners coming before this Court, claiming that the federal courts have been divested of jurisdiction on the basis of the patently incorrect mathematical analysis based on an outside-the-record document. Petitioners' arguments may fairly be characterized as frivolous.

It has frequently been observed that the federal courts should be alert to protect their diversity jurisdiction against maneuvers designed to defeat it. *Gentle* v. *Lamb-Weston, Inc.*, 302 F.Supp. 161, 165 (1969). Sham claims or merely "colorable" claims regarding simulated matters of controversy designed to either confer or defeat jurisdiction should not be tolerated. *Emland Builders, Inc.* v. *Shea*, 359 F.2d 927 (10th Cir. 1966); *Wecker* v. *National Enameling & Stamping Co.*, 204 U.S. 176 (1907).

The presence or addition of fictitious or unnamed parties to a suit cannot be used to divest the federal court of diversity jurisdiction. *Ward* v. *Connor*, 495 F.Supp. 434 (1980), rev'd on other grounds, 657 F.2d 45 (4th Cir. 1981), cert.den. 455 U.S. 907 (1982).

Gentle v. *Lamb-Weston, Inc., supra,* contains a particularly cogent analysis of this Court's past decisions relating to these matters:

> . . .
> . . .[M]oreover, in the years since 1887 the [U.S. Supreme] Court has condemned similar practices in a way which makes it clear that the federal courts should be alert to protect their [diversity] jurisdiction against cleverly-designed maneuvers designed by ingenious counsel to defeat it. Thus, in Ex parte Nebraska, 209 U.S.436, 28 S.Ct. 581, 52 L.Ed. 876 (1908), the Court refused to accept the appearance of the State of Nebraska as a party plaintiff and its allegation of an interest in the action as conclusive. Instead, the Court held that the federal circuit court properly refused to remand the case to the state court because, on an examination of the entire record, it was apparent that the State of Nebraska was a mere nominal party plaintiff with no substantial interest in the controversy. Likewise, in Wecker v. National Enameling and Stamping Co., 204 U.S. 176, 27 S.Ct. 184, 51 L.Ed. 430 (1907), the plaintiff, in a tort action, joined a codefendant for the express purpose of destroying diversity. Since the sham was apparent (because the codefendant could not conceivably have been liable), the Supreme Court affirmed the circuit court's refusal to remand to the state court. The court concludes its opinion with the following words of admonition, applicable here:
>
> > While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, *it is equally true that the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has the right and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction.* (Emphasis the Court's)

302 F. Supp. at 164-165

Petitioners' contention that the federal district court and Ninth Circuit were without jurisdiction to make the determinations that no viable claim existed on behalf of the alleged class of trustors is simply wrong. *Kramer* v. *Carribean Mills, Inc.*, 394 U.S. 823 (1969). Again, *Gentle* v. *Lamb-Weston, Inc., supra,* addresses the point directly:

> Only one further comment is necessary. Plaintiffs strenuously argue that the state court is the proper forum to determine whether the assignments are invalid because they were made to defeat federal jurisdiction. [Citations omitted.] However, as the Supreme Court noted in Kramer v. Carribean Mills, Inc., *supra,* 395 U.S. at 829, 89 S.Ct. at 1490, "The existence of federal jurisdiction is a matter of federal, not state, law." Since all the facts relating to the assignments are before this Court, there is no necessity for remand to the state court for a determination as to their effect upon this Court's jurisdiction. *See* Wilson v. Republic Iron & Steel Co., *supra,* 257 U.S. at 97, 42 S.Ct. 35; Phoenix Mutual Life Ins. Co. v. England, *supra* 22 F.Supp. at 286; *see also* Lisenby v. Patz, *supra.* As Professor Moore has observed, "[I]f the federal courts will not protect their jurisdiction from fraudulent evasion it is not likely that state courts will do it for them." Moore, *supra,* 17.05[2] at 154.

302 F.Supp. at 166

In this case the federal courts, in making the relevant determinations, determined that no class exists and no viable claims exist.

III. Respondent's Request for Sanctions:

This matter has been in litigation for more than ten years. Petitioners have repeatedly ignored federal court orders and continue in their attempts to relitigate matters previously decided. They present jurisdictional arguments to this Court which are drawn from matters outside the record and proceed to present arguments based on those beyond the record documents which are patently and grossly erroneous, if not intentionally misleading.

Both the District Court and the Court of Appeals noted the gross abuse of the judicial process which has been perpetrated by petitioners and their counsel. Petitioners' counsel's response to this is to accuse Judge Copple, of the District Court, and Judges Duniway, Hug, and Skopil of the Court of Appeals of having a "peculiar animus" against petitioners and of "inflicting injudicious hostility" upon his clients and himself.

The Court of Appeals, in holding that petitioners' appeal was frivolous, noted that:

> Appellees have expended large amounts of time and money defending against the numerous and poorly drafted pleadings filed in this and related proceedings. The right of these defendants to be free from this costly litigation and the right of other litigants must be considered. The instant appeal is frivolous.

Petitioners have responded to this judicial admonition by instituting yet another costly appellate procedure. We respectfully request sanctions against petitioners and their counsel pursuant to Rule 49.2, Rules of the Supreme Court of the United States, pursuant to 28 U.S.C. § 1927, and pursuant to the inherent power of this Court. *Roadway Express, Inc.* v. *Piper,* 447 U.S. 752 (1980).

CONCLUSION

The District Court's dismissal was entirely proper. There exists no error of fact or law in either the District Court Order or the Court of Appeals Opinion.

Petitioners' 11th hour attempt to interject an issue as the "amount in controversy" requirement of 28 U.S.C. § 1332 is both improper and without merit. It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JENNINGS, KEPNER & HAUG

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Attorneys for Respondent

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

RELIANCE INSURANCE COMPANY,
a corporation,

Plaintiff,

vs.

RICHARD W. KOEB, as Receiver for Heritage Trust Company; ROBERT C. HATCH and CLAUDIA R. HATCH, his wife; and WALTER C. MADSEN, Superintendent of Banks, State of Arizona,

Defendants.

CIV 77-843 PHX WEC

ORDER GRANTING PERMANENT INJUNCTION AND REQUIRING INTERPLEADER

This matter having come on regularly for hearing on the Court's Order for Issuance of Process, Injunction Against Interpleaded Claimants, and Hearing, dated the 1st day of November, 1977, requiring the defendants and each of them, to appear and show cause, if any they have, why they should not be required to interplead their claims in and to the sum deposited by the plaintiff with the Registry of this Court, and why the temporary injunction heretofore issued by this Court should not be made permanent.

And it appearing to the court that:

(1) The Court has jurisdiction of this cause under Title 28, U.S.C.A., Section 1335, to grant the relief requested.

(2) This is an action in the nature of Interpleader commenced under and by virtue of 28 U.S.C.A., Section 1335, the statutory requisites thereof having been duly satisfied.

(3) The Court's temporary injunction was duly entered pursuant to 28 U.S.C.A., Sections 1335 and 2361.

(4) The Court's order of November 15, 1977, dissolving the temporary injunction was entered without proper notice to opposing parties and an opportunity to be heard.

NOW, THEREFORE, IT IS ORDERED that the Court's Order of November 15, 1977, dissolving the temporary injunction may be, and the same is hereby vacated, and it is further

ORDERED that the defendants, and each of them, are hereby permanently enjoined and restrained from instituting or prosecuting, in any State court or in any United States court, any suit or proceeding on account of or pertaining to the liability of the Reliance Insurance Company on account of the issuance of its Bond No. B 729077 to Heritage Trust Company, or from continuing with the prosecution of any actions or any proceedings already instituted or commenced against the plaintiff, Reliance Insurance Company, in relation to such bond, and

IT IS FURTHER ORDERED that the defendants and each of them be and they are hereby required to interplead and relitigate among themselves and with plaintiff their claims in and to the sum of ONE MILLION DOLLARS ($1,000,000.00) evidenced by the Bond on Interpleader heretofore delivered by plaintiff to the Clerk of this Court.

DONE IN OPEN COURT this 6th day of March, 1978.

/s/ WALTER E. CRAIG

Walter E. Craig
United States District Judge

A-2.1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ROBERT C. HATCH, *et al.*,

Plaintiffs,

v.

RELIANCE INSURANCE COMPANY,

Defendant.

CIVIL ACTION NO. G-82-358

ORDER

BEFORE THE COURT are three motions and responses in opposition concerning the validity of the removal of this diversity action from state court. Although plaintiffs have buttressed their motion to dismiss and motion to remand with other arguments, principally their contention centers on the sufficiency of the jurisdictional allegation in the petition for removal. In pertinent part the petition appears lacking because it does not set forth when defendant, Reliance Insurance Company [Reliance], obtained its citizenship for the purposes of diversity jurisdiction. Defendant moves to amend its petition to set forth these details.

The Fifth Circuit has held that the failure to allege citizenship at the time the suit was brought and at the time the petition was filed is not fatally defective and may be cured by an amended petition, even at the appellate stage. *See D. J. McDuffie, Inc.* v. *Old Reliable Fire Insurance*, 608 F.2d 145, 146-47 (5th Cir. 1979), *cert. denied*, 449 U.S. 830 (1980). *Accord Merrill, Lynch, Pierce, Fenner & Smith, Inc.* v. *Haydu*, 637 F.2d 391, 396 n.9 (5th Cir. 1981).

Hence, the Court finds that the removal petition should not be dismissed and that defendant's request to amend is entirely proper.

In addition, the Court rejects plaintiffs' other arguments as follows:

(1) Plaintiffs claim that this lawsuit is a continuation of a suit filed in 1977, and thus, defendant has waived its right to remove. In the 1977 lawsuit, plaintiffs attempted to garnish the proceeds of a bond issued by Reliance to Heritage Trust Company [Heritage], an Arizona investment company. Under the bond, Reliance agreed to indemnify Heritage for losses resulting from Heritage employee dishonesty. Plaintiffs had sued Heritage and its officers in 1975, alleging that the defendants had defrauded plaintiffs of their investment money. They won a default judgment in 1976. Seeking payment of that judgment, they then filed the garnishment proceeding. This lawsuit was drawn into a federal interpleader action filed by Reliance in Arizona. The interpleader was dismissed in 1982. Meanwhile, in 1981, the state garnishment proceeding was dismissed for want of prosecution. In 1983, after the filing of the action on this Court's docket, plaintiffs attempted to reinstate their garnishment proceeding but the state court, lacking any discretion to reinstate due to plaintiffs' delay, denied the motion. *See* Tex.R.Civ.P. 165(a).

The present lawsuit alleges factually related yet different claims than those upon which the garnishment was based. It is brought against Reliance rather than Heritage and basically alleges that Reliance conspired with Heritage to defraud plaintiffs and that Reliance's interpleader action amounted to an abuse of process. Upon review of the record, the Court finds no continuation of lawsuits, and, thus, the defendants timely removed this lawsuit.

(2) Plaintiffs claim that they recently have amended their complaint *in state court* to add a non-diverse, indispensable party. Section 1446(e) provides that upon removal "the State court shall proceed no further unless and until the case is remanded." 28 U.S.C. §1446(e). Even if removal is later found improper, state court proceedings after the filing of the removal petition will be vacated and are of no effect. 14 Wright & Miller, Federal Practice & Procedure §3737 at 7431-44 (1976). *See Perimeter*

Lighting, Inc. v. *Karlton,* 456 F.Supp. 355, 360 (N.D. Ga. 1978) (complaint filed in state court after removal petition filed "nct relevant" to determination of jurisdiction). Consequently, the alleged attempt by plaintiff to amend in state court (defendant disputes that the amendment has taken place), is ineffective to destroy diversity in this proceeding.

Accordingly, it is ORDERED, ADJUDGED and DECREED that

(1) plaintiffs' motion for dismissal of defendant's petition of removal and plaintiffs' motion to remand are DENIED; and

(2) defendant's motion for leave to file a second amended petition for removal is GRANTED.

DONE at Galveston, Texas, this the 29th day of June, 1983.

/s/ HUGH GIBSON

Hugh Gibson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ROBERT C. HATCH, *et al.*,

Plaintiffs,

v.

RELIANCE INSURANCE COMPANY,

Defendant.

CIVIL ACTION
No. G-82-358

ORDER

BEFORE THE COURT is defendant's motion for change of venue. *See* 28 U.S.C. § 1404(a). Defendant argues that the claims asserted herein arise in Arizona and that on balance the factors of convenience weigh in favor of transfer there. In opposition, plaintiffs argue that venue is proper in Texas. Having reviewed the record and applicable law, the Court concludes that venue is proper in Arizona and that a transfer of this action to Arizona would be proper.

A transfer under § 1404(a) required two findings—that the district is one where the action "might have been brought" and that the "convenience of parties and witnesses, in the interest of justice" favors transfer.

Venue of a diversity action is proper where the parties reside or where the claim arise. 28 U.S.C. § 1319(a). Plaintiffs reside in the Southern District of Texas, and, hence, venue is proper here. A corporation's residency for venue purposes is where it is incorporated, where it is doing business or is licensed to do business. 28 U.S.C. § 1391(c). Hence, Reliance Insurance Co. [Reliance] may claim residency at least in Pennsylvania, the state of its incorporation and principal place of business. The alleged

connection this case has with the District of Arizona is that the claims allegedly arose there.

Plaintiffs make the following three claims against Reliance: (1) that Reliance's filing of an interpleader action in Arizona federal court, which filing brought in the plaintiffs' then-pending Texas garnishment action, amounted to an abuse of process; (2) that by selling its insurance bond to Heritage Trust Co. [Heritage], Reliance conspired to defraud plaintiffs who, because of the bond, would be induced to invest in Heritage; and (3) that Reliance negligently issued the bond knowing that Heritage would use the existence of the bond to lure investors.

In determining whether venue is proper in Arizona, the Court is guided by two principles. First, federal law governs the determination of this question. *Sutain* v. *Shapiro & Liebe*[illegible] 678 F.2d 115, 117 (9th Cir. 1982). Second, where multiple claims are asserted, as in this case, venue must be proper for all. *See* 15 Wright, Miller & Cooper, *Federal Practice & Procedure* § 3808 at 41 (1976).

The Fifth Circuit has commented that the legislative purpose of creating venue based upon where the claim arose,

> was to "facilitate the disposition of . . . claims by providing . . . a more convenient forum to the litigants and witnesses involved." H.R.Rep.No. 1893, 89th Cong., 2d Sess.2 (1966). Thus, "where the claim arose" should "be ascertained by advertence to events having operative significance in the case, and a commonsense appraisal of the implications of those events for accessibility to witnesses and records." *Lamont* v. *Haig*, 590 F.2d 1124, 1134 (D.C. Cir. 1978). This is not to suggest that only a single district can satisfy the statutory standard with respect to any given claim. Often, the factors deemed determinative might well indicate the suitability of several forums.

Florida Nursing Home Ass'n v. *Page*, 616 F.2d 1355, 1361 (5th Cir.) *cert. denied*, 449 U.S. 872 (1980), *rev'd on other grounds*, 450 U.S. 147 (1981) (citations omitted). *Accord Clayton* v. *Prudential Insurance Co. of America*, 554 F.Supp. 628, 631 (S.D. Tx. 1982); *Gurrola* v. *Griffin & Brand Sales Agency, Inc.*,

524 F.Supp. 113, 116-117 (S.D. Tx. 1980) (aggregate of opertive facts).

After a thorough and commonsense review of this record, the Court concludes that the operative facts or events in large part took place in Arizona. Heritage operated in Arizona. The bond transaction apparently transpired there. The interpleader and subsequent, related litigation was begun and resolved there. Thus, numerous witnesses and documents relating to plaintiffs' claims are located in that state. Plaintiffs, on the other hand, have not indicated what witnesses or documents are located within Texas. Although plaintiffs may have relied on Heritage's solicitation in Texas and they may have been served with process for the interpleader in Texas, these facts, at best, suggest an alternative district where the claims arose. *See Florida Nursing Home, supra* at 1361. However, the Court finds that, on balance, the "events having operative significance" took place in Arizona, and, thus, venue is proper there.

Between Arizona and Texas, the court concludes that the more convenient venue would be the Arizona district. Plaintiffs choice of forum is but one factor that the Court must consider. In this case, other factors, such as the location of identified witnesses and documents, weigh heavily in favor of transfer.

Accordingly, it is ORDERED, ADJUDGED and DECREED that

(1) defendant's motion for change of venue is GRANTED;

(2) this action is hereby TRANSFERRED to the United States District Court for the District of Arizona, sitting in Phoenix, Arizona; and

(3) the records and papers now on file in this action in the office of the Clerk of this Court shall be transmitted by the Clerk to the Clerk of the United States District Court for the District of Arizona, sitting in Phoenix, Arizona, to be filed in that office.

DONE at Galveston, Texas, this the 29th day of June, 1983.

/s/ HUGH GIBSON

Hugh Gibson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ROBERT C. HATCH, *et al.*,

Plaintiffs,

v.

RELIANCE INSURANCE COMPANY,

Defendant.

CIVIL ACTION No. G-82-358

ORDER

BEFORE THE COURT is plaintiffs' motion to amend their complaint. The proposed second amended complaint seeks to add a non-diverse party defendant and to allege causes of action which are not in contempt of court order. Defendant is opposed to plaintiffs' attempt to add the non-diverse party.

Heritage Trust Co. [Heritage] was an investment trust company, owned and controlled by John R. Bromley and his wife. In the early '70's, Reliance Insurance Co. [Reliance] issued a bond to Heritage, agreeing to indemnify Heritage for losses due to Heritage employee dishonesty. When claimants, such as the Hatch plaintiffs, filed competing claims to the bond money, Reliance filed an interpleader action in Arizona federal court. As part of the interpleader, the Arizona district court permanently enjoined the prosecution or institution of actions relating to Reliance's issuance of its bond. Although the interpleader was dismissed in 1982, the Arizona court found portions of the original complaint filed herein in contempt of its injunction.

This action was filed in state court and removed to this Court which has subject matter jurisdiction by virtue of diversity of citizenship. Plaintiffs are Texas residents and defendant Reliance Insurance Company is a Pennsylvania corporation.

Plaintiffs propose to add Bromley, a Texas resident, as a co-conspirator. As justification for the addition, plaintiffs assert they can obtain his testimony more easily if he is a party than if he is not.

The original complaint, in those counts not in contempt of the Arizona court order, alleged against Reliance that an interpleader action filed by Reliance was an abuse of process, that Reliance conspired with Heritage to defraud Heritage investors, and that Reliance negligently issued its bond of indemnification to Heritage. In their proposed amended complaint, plaintiffs have alleged only those counts; thus in that respect, the Court finds the amendment proper.

If a removed lawsuit comes within a federal court's subject matter jurisdiction when it is removed, a plaintiff generally is not allowed to change his petition to defeat jurisdiction. *See St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283 (1938) (jurisdictional amount). *See generally* 14 Wright & Cooper, Federal Practice & Procedure §3723, at 598-99 (1976).

Regarding the addition of non-diverse parties, if, on the one hand, they are indispensable parties, the court must join them and remand would be proper. *See Jeff* v. *Zink*, 362 F.2d 723, 726 (5th Cir.), *cert denied*, 385 U.S. 987 (1966); *Hilton* v. *Atlantic Richfield*, 327 F.2d 217, 219 (1964). *See Stanhope* v. *Ford Motor Credit Co.*, 483 F.2d 275, 277 (W.D. Ark. 1980). On the other hand, the Fifth Circuit has stated that joinder and remand of not indispensable parties is "clearly improper." *In re Merrimack Mutual Fire Insurance Co.*, 587 F.2d 642, 647 (5th Cir. 1978). *Accord* 1A Moore, *Federal Practice* ¶0.161[1], at 209 (2d ed. 1982). Thus, the critical question is whether Bromley is an indispensable party.

Co-conspirators are not indispensable parties. *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 463 (1945); *Herpich* v. *Wallace*, 430 F.2d 792, 817 (5th Cir. 1970); *Professional Investors Life Insurance Co.* v. *Roussel*, 528 F.Supp., 391, 404 (D. Kan. 1981).

As an alleged conspirator, Bromley is not indispensable; hence, jurisdiction having been properly established in this Court, the Court finds that joinder of Bromley and the resulting remand would be improper. Thus, in this respect, the Court finds the proposed amended complaint improper.

Accordingly, it is ORDERED, ADJUDGED and DECREED that plaintiffs' motion to amend is GRANTED in part and DENIED in part; plaintiffs' motion to add John R. Bromley as party defendant is DENIED; plaintiffs' motion to amend the complaint so that it comports with the prior court order is GRANTED; and plaintiffs have ten (10) days to file an amended complaint without adding parties defendant, unless prior permission of the Court is obtained.

DONE at Galveston, Texas, this the 29th day of June, 1983.

/s/ HUGH GIBSON

Hugh Gibson
United States District Judge

A-5.1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ROBERT C. HATCH, *et al.*,

Plaintiff,

vs.

RELIANCE INSURANCE COMPANY,

Defendant.

No. Civ. 83-1266 Phx. WPC

ORDER

Counsel for plaintiffs has filed a motion for order to produce documents directed at a non-party. The Court notes that although named plaintiffs and their counsel purport to represent a class consisting of "Trustors of Heritage Trust Company", a request to certify the class pursuant to Rule 23(c)(1) F.R.Civ.P. has never been made nor such an order entered.

IT IS ORDERED:

The Court will hear arguments on both issues at 10:00 A.M. Monday, April 30, 1984.

/s/ WM. P. COPPLE

Wm. P. Copple
United States District Judge

Mailed this 27th day of March, 1984, to:
Counsel